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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

Term,

No.

JOHN LaGUARDIA,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

JAMES K. O'MALLEY
Attorney for Petitioner
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205 Ross Street
Pittsburgh, Pennsylvania 15219

QUESTIONS PRESENTED

I. Was Petitioner denied his Sixth Amendment right to a fair and impartial jury by the prosecution's closing argument, that the most critical evidence in the case against Petitioner was a question asked by defense counsel?

II. Was Petitioner denied his Sixth Amendment right to produce witnesses on his behalf by the trial court's refusal to grant a short delay to enable Petitioner to enforce an order under the Interstate Rendition of Witness Act?

III. Did the trial court shift the burden of proof from the Commonwealth to the Petitioner by commenting in the presence of the jury that the Petitioner could call his father as a witness to prove ownership of certain seized guns?

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COMMONWEALTH OF PENNSYLVANIA,
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PETITION FOR WRIT OF CERTIORARI TO
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Your Petitioner, John LaGuardia, prays that a Writ of Certiorari issue to review the Judgment of The Supreme Court of Pennsylvania entered in the above-captioned case.

OPINIONS BELOW

An opinion was rendered by the Court of Common Pleas of Mercer County, Pennsylvania, denying Petitioner's post-trial motions. Said opinion is not reported but is set forth herein at Appendix A.

An opinion affirming the Court of Common Pleas' judgment of conviction was rendered by the Superior Court of Pennsylvania on July 30, 1982. Said opinion is not reported but is set forth at Appendix B.

On November 5, 1982, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal. A copy of that Order is set forth at Appendix C.

JURISDICTION

The order of the Pennsylvania Supreme Court denying the Petition for Allowance of Appeal was filed on November 5, 1982. Pursuant to Rule 20 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within sixty days after the entry of the Pennsylvania Supreme Court's final order.

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

I. Was Petitioner denied his Sixth Amendment right to a fair and impartial jury by the prosecution's closing argument, that the most critical evidence in the case against Petitioner was a question asked by defense counsel?

II. Was Petitioner denied his Sixth Amendment right to produce witnesses on his behalf by the trial court's refusal to grant a short delay to enable Petitioner to enforce an order under the Interstate Rendition of Witness Act?

III. Did the trial court shift the burden of proof from the Commonwealth to the Petitioner by commenting in the presence of the jury that the Petitioner could call his father as a witness to prove ownership of certain seized guns?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Title 18, Purdon's Statutes, Section 2702 provides as follows:

> §2702 Aggravated assault
>
> (a) Offense defined.—A person is guilty of aggravated assault if he:
>
> (1) attempts to cause serious bodily injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
>
> (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to a police officer making or attempting to make a lawful arrest;
>
> (3) attempts to cause or intentionally or knowingly causes bodily injury to a police officer making or attempting to make a lawful arrest; or

(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

Title 18, Purdon's Statutes, Section 2705 provides as follows:

§2705 Recklessly Endangering

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

Title 35, Purdon's Statutes, Section 780-113(a)(30) provides as follows:

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

(3) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

Title 18, Purdon's Statutes, Section 903 provides as follows:

(a) Definition of Conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

STATEMENT OF THE CASE

History

Petitioner was arrested in Trumbull County, Ohio, on March 5, 1978, for various crimes allegedly committed a short time earlier in Mercer County, Pennsylvania. He was charged with two counts of attempted murder, three counts of aggravated assault and recklessly endangering, recklessly endangering, possession with intent to deliver cocaine, unlawful possession of a controlled substance and conspiracy.

He was tried before the Honorable Albert J. Acker and a jury in Mercer County, Pennsylvania, and on May 25, 1979, he was convicted of aggravated assault, 18 P.S. §2702, recklessly endangering, 18 P.S. §2705, criminal conspiracy, 18 P.S. §903, and possession with intent to deliver, 35 P.S. §780-113(a)(30). He was acquitted by the jury on the remaining twelve counts. Petitioner was sentenced to 4½ to 10 years in the state penitentiary.

The case was characterized as a "buy-bust" drug transaction. The Commonwealth alleged that William Frank and James Sutley, informants working for the Mercer County Narcotics Unit, arranged to buy two pounds of cocaine from Petitioner for $35,000.00 on March 5, 1978. Although he authorized the purchase, Chief Lenzi of the Narcotics Unit testified that he did not have the money to complete the transaction so he called a businessman to get the cash. The businessman allegedly called was informant Frank's brother. He did not testify.

On March 5, 1978, William Frank allegedly produced a bag containing $35,000.00 cash, which he gave to Chief Lenzi, who, in turn, gave it to informant Sutley.

Sutley then met with Petitioner and a co-defendant, Patrick Harbison, in a hotel parking lot to complete the alleged transaction. It was not certain whether Petitioner was to have

the cocaine with him at the meeting or have it somewhere nearby, but Sutley was to signal the police by lighting a match when he was sure Petitioner had the drugs. After a few minutes in the car, Sutley did light a match, although Petitioner did not have the two pounds of cocaine in the car. Other than a very small amount, no cocaine was ever recovered.

The police, seeing the signal, came in with guns drawn to make an arrest. Petitioner's car pulled away quickly, guns were fired and a high-speed chase from the parking lot to Trumbull County, Ohio, ensued.

After Petitioner was arrested, a deputy sheriff from Trumbull County, Ohio, said he found the $35,000.00 in the car and turned it over to Lieutenant Whiteside, his superior.

When Petitioner learned this, he contacted Lt. Whiteside, who said he never saw or received any money from anyone that night or anytime. He was retired from the Sheriff's Department at that time, however, and he refused to appear in court voluntarily. Petitioner obtained an order under The Interstate Rendition of Witnesses Act to compel Lt. Whiteside's appearance, but the court refused to delay the trial to enable Petitioner to enforce the order (A. 450a, 450b)

Petitoner testified in his own behalf and denied knowledge of any drug transaction and denied that he or anyone in his car fired a gun that night. He said that he did not own any guns.

In rebuttal, the Commonwealth presented a police officer who testified that he searched the apartment where Petitioner and his father lived and found a number of guns.

On cross-examination, defense counsel asked the officer if at the time the guns were found, Petitioner's father did not say the guns were his.

The court sustained an objection to the question and said the father was in court and was available to be called. Petitioner did not call his father as a witness. (A. 592, 593)

When Petitioner was returned to Mercer County to stand trial on these charges, he retained Attorney Herman Rogers of Sharon, Pennsylvania, to represent him. The District Attorney moved to disqualify Mr. Rogers because he had previously represented the informant, William Frank. A hearing was held and briefs submitted on this motion. Throughout his brief, Mr. Rogers referred to William Frank as Willie.

During his cross-examination of Chief Lenzi, the new counsel for Petitioner referred to William Frank as Willie Frank. Subsequently, there was testimony by Frank that he used the name Willie in a meeting with Petitioner.

In her closing to the jury, the District Attorney argued that the jury could infer from counsel's use of the name Willie in his questions, that his client had given him that as the person he met with. Counsel objected that the name Willie had been used in an earlier hearing and that his questions were not evidence. The court, nevertheless, permitted the argument because it could find no reference to the name "Willie" in the transcript of the preliminary hearing. Unfortunately, the court did not review all of the pretrial record and did not review Attorney Rogers' brief where "Willie" was used throughout. (A. 594, 595)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The Sixth Amendment guarantees an accused the right to a trial by an impartial jury.

"The 'impartial jury' guaranteed by the Sixth Amendment is one which is of impartial frame of mind at beginning of trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting defendant with the commission of the crime charged." *Baker v. Hudspeth,* 129 F.2d 779, 10th C., 1942.

The rule that the jury is only to be influenced by answers given and not questions asked is so fundamental that it has long been a standard jury instruction.

> "Questions asked by the lawyers are not evidence, for the evidence consists of the witnesses' answers to questions." *Federal Jury Practice and Instruction*, Devitt and Blackman, Volume 1, Section 10.01.

It is recognized that counsel for either side can suggest to the jury appropriate inferences to be drawn from the evidence, but such arguments must be limited to the facts in evidence and the appropriate inferences to be drawn therefrom.

> "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 1646, 6 L.Ed.2d 751, 1961 (concurring opinion); *Deutch v. United States*, 367 U.S. 456, 81 S.Ct. 1587, 6 L.Ed.2d 963, (1961).

The trial court's ruling, permitted the District Attorney to argue that one of the most "critical items" of evidence against Petitioner was a question that his counsel had asked, allowed the jury to consider facts that were not in evidence and to base their verdict on those facts. The ruling denied Petitioner his right to an impartial jury.

II.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a

defense. This right is a fundamental element of due process of law." *Washington v. State of Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, 1967.

Because the testimony of the Commonwealth's witness and the Petitioner conflicted, the credibility of witnesses was the most important factor in this trial.

Of the many points on which the testimony was conflicting, none was so significant as that concerning the ownership and use of the $35,000.00.

It was the Commonwealth's contention that the $35,000.00 was obtained by them from their informant's brother for the planned drug purchase.

It was Petitioner's contention that the money belonged to Pat Harbision, his co-defendant, and was given by him to the informant Sutley. Petitioner said he never received the money from anyone and never had any agreement to do so.

Where the money came from and where it went, then, was of critical importance to Petitioner's defense.

If the money was not turned over to Lt. Whiteside and inventoried and returned to Chief Lenzi, it must have been taken by someone else and kept for his own use. Since it would make no sense to steal your own money or money for which you are personally liable, Lt. Whiteside's testimony would have supported Petitioner's testimony that the money was his co-defendant Harbison's.

Counsel for Petitioner exercised due diligence in attempting to procure the witness' presence. He contacted him as soon as he learned of him and when he determined that he would not voluntarily appear, he instituted the appropriate proceedings.

The witness could have been produced within a day or two at most as counsel had his address and phone number and a member of the Sheriff's Department said he could find him.

Because Petitioner was not given the opportunity to produce a critical witness in his defense, he was denied his Sixth Amendment right.

III.

This Court held in *In Re Winship*, 297 U.S. 362, 90 S.Ct. 1068, that the Due Process Clause protects an accused against conviction unless the State has borne the burden of proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

By commenting in the presence of the jury that Petitioner could call his father to prove ownership of certain guns seized at the house occupied by Petitioner and his father, the court shifted the burden of proof on a critical element of the case to Petitioner.

Petitioner was charged with and convicted of, inter alia, causing bodily injury by firearms and recklessly endangering by firearms or automobile.

No weapon was ever recovered from Petitioner, however, and he testified that he did not own any firearms and did not have any the night in question.

To rebut that testimony, the Commonwealth was permitted to introduce evidence, over Petitioner's objection, that a number of guns were seized from the home Petitioner and his father shared. Petitioner attempted to elicit on cross-examination of the officer making the seizure the fact that his father had told the officer at the time the guns were seized that they were his. The court refused to permit the question and said in open court that the father was in court and could be called as a witness.

The court's comment clearly shifted to defendant the burden of proving that the guns seized were not his and were not used by him.

The jury could not help but draw a negative inference from petitioner's failure to thereafter call his father as a witness.

CONCLUSION

For the reasons discussed above, Petitioner John LaGuardia requests a Writ of Certiorari issue to review the Judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

JAMES K. O'MALLEY
Attorney for Petitioner

APPENDIX A

IN THE

COURT OF COMMON PLEAS

OF MERCER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH
vs.
JOHN J. LaGUARDIA

No. 175
Criminal 1978

For the Commonwealth:

For the Defendant:

Samuel J. Orr, IV.,
District Attorney

Frances S. Palmer,
Assistant District Attorney

William M. Panella,
Attorney at Law
372 East Washington Street
New Castle, Pennsylvania 16101

Carmen A. Policy,
Attorney at Law
424 City Centre One
Youngstown, Ohio 44503

OPINION

ACKER, J.

This defendant has been convicted by a jury of aggravated assault upon Dana Frankenburg, a deputy sheriff of Mercer County, causing bodily injury by firearms while attempting to

make a lawful arrest,[1] recklessly endangering Gary Lenzi, the chief of the Mercer County Narcotics Unit, by firearms or by automobile,[2] possession of cocaine with intent to deliver[3] and conspiracy as to possession of cocaine with intent to deliver.[4] The defendant was found not guilty by a jury of all other charges.[5]

Defendant's counsel, William M. Panella, raised by brief and argued orally ten contentions, all of which are dealt with in this Opinion in the order in which they were advanced.

This case resulted from a "buy-bust" effort by the Mercer County Narcotics Unit in a transaction in which two pounds of cocaine were to be purchased for $35,000.00. The transaction

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[1]Act of December 6, 1972, P. L. , No. 334, Section 1 [18 C.P.S.A. 2702].

[2]Act of December 6, 1972, P. L. , No. 334, Section 1 [18 C.P.S.A. 2705].

[3]Act of December 30, 1974, P. L. 1041, No. 340, Section 1 [35 P. S. 780-113(a)(30)].

[4]Act of December 6, 1972, P. L. , No. 334, Section 1 [18 C.P.S.A. 903].

[5]The defendant was found not guilty of criminal conspiracy as to aggravated assault upon Dana Frankenburg while not attempting to make a lawful arrest, aggravated assault upon Dana Frankenburg either by firearms or by automobile while not attempting to make a lawful arrest, criminal conspiracy as to aggravated assault upon Dana Frankenburg while attempting to make a lawful arrest, aggravated assault upon Dana Frankenburg not causing bodily injury by either firearm or automobile while attempting to make a lawful arrest, conspiracy as to murder in the first degree of Dana Frankenburg by use of a gun, criminal conspiracy as to recklessly endangering as to Gary Lenzi by firearms or automobile, criminal conspiracy of aggravated assault upon Gary Lenzi causing bodily injury while attempting to make a lawful arrest, aggravated assault upon Gary Lenzi causing bodily injury by firearms only while attempting to make a lawful arrest, criminal conspiracy as to aggravated assault upon Gary Lenzi either by firearms or automobile while not attempting to make a lawful arrest, aggravated assault upon Gary Lenzi either by firearms or automobile while not attempting to make a lawful arrest, criminal conspiracy as to aggravated assault upon Gary Lenzi while attempting to make a lawful arrest, aggravated assault upon Gary Lenzi by either firearms or automobile while attempting to make a lawful arrest.

was in the early evening after dark on March 5, 1978 at the Sheraton Inn, Shenango Township, near the Borough of West Middlesex, on Interstate 80. The partner of the undercover agent was to show the defendant $35,000.00 in cash. The defendant, along with his partner who has jumped bail and never been tried, was to produce cocaine for testing. The partner of the undercover agent was to suggest they go to a room in the Sheraton Inn for that purpose. If the cocaine was satisfactory, the monies would be surrendered upon the delivery of two pounds of cocaine. By pre-arrangement when the informant in the defendant's car saw the cocaine, he was to light a cigarette which would alert the members of the Narcotics Unit who were stationed in various places in or about the parking lot in the Sheraton Inn to close in and make the arrest. As the officers came forward the defendant and his partner became suspicious. One or both of them started shooting at the officers and accelerated their vehicle out of the parking lot. Just prior to the acceleration, Chief Lenzi jumped on the hood of the car but was thrown off. Officer Dana Frankenburg was grazed by a bullet under the right eye. Fortunately it produced only a slight wound. The informant was retained in the defendant's car until the defendants released him at a motel a short distance away. A high-speed chase evolved with officers of the Narcotics Unit, Hermitage and West Middlesex police departments, Pennsylvania State Police, Ohio State Patrol and several Trumbull County, Ohio, Sheriffs' cars. Eventually the defendant was stopped approximately 10 miles from the scene after driving a circuitous route ending on Interstate 80 just inside the Ohio border. Eventually extradition was successful as to LaGuardia. He was arrested for failure to appear after extradition was ordered and the case came for trial.

I DID THE COURT'S REFUSAL OF A DAY'S CONTINUANCE SO THAT ATTORNEY CARMEN POLICY COULD BE AVAILABLE DENY THE DEFENDANT A FAIR TRIAL?

Attorney Carmen A. Policy was the sixth attorney who at one stage or another of the proceedings represented the defendant. In addition to William Panella, of the Pennsylvania Bar with offices in New Castle, Lawrence County, who represented the defendant throughout, the defendant had at various times Attorneys Hanni, Petkovich and D'Apolito, all from Ohio. Attorney Policy is also from Ohio. He is not licensed to practice in Pennsylvania. Attorney Herman Rodgers of the Mercer County bar at one stage was engaged to represent the defendant but it became apparent that he had a conflict of interest due to his previous representation of a material witness for the Commonwealth arising from a criminal event. He was therefore forced to withdraw as counsel by this Court through an Order of Stranahan, P.J. The effort to have Attorney Policy enter the case was 14 months after its commencement. He had not represented the defendant in any preliminary hearing, extradition hearing or suppression hearing. At the conclusion of a discovery motion hearing on May 10, 1979, defendant's attorney of record, Panella, presented a "Petition to proceed hoc pro tunc" sworn to by Carmen A. Policy but not the defendant, John J. LaGuardia. The prayer of the petition was that Policy be permitted to proceed"... as co-counsel with William M. Panella, Esquire." Despite the opposition by the Commonwealth, this Court entered on Order following a memorandum opinion permitting Policy to participate in the trial with William M. Panella. The order stated,

> "... there shall be no continuance of this case due to the lateness of the petition and the inconvenience to all the parties who would be occasioned thereby. The case shall be tried as scheduled at the forthcoming May, 1979, trial term, but this order will not relieve William M. Panella, Esquire, counsel of record, of any of his responsibilities to the Court by this Order."[6]

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[6]The petition was in violation of Pennsylvania Bar Admission Rule 301(b) which requires that the matter be filed with the Clerk of Courts at least

(continued)

One starts with the certain knowledge that there is no constitutional right to be represented by counsel from out-of-state. *Leis vs. Fliynt,* 24 Cr. L. 4155 ( ), U.S. , 99 Sup. Ct. 698, reh. den. U.S. , 99 Sup. Ct. 2185 (1979). This does not mean, however, a defendant has no right of assistance of counsel of his own choosing. The right to select an attorney of one's choosing is a necessary correlary to the right of counsel guaranteed both by the Federal and State constitutions. That right, however, is not unqualified. The test is stated in *Commonwealth vs. Flynn,* 248 Pa. Super. Ct. 62 at page 67, 374 A.2d 1317 (1977),

> "...the desirability of permitting a defendant additional time to obtain private counsel of his choice must be weighed against the public need for the efficient and effective administration of justice. *Commonwealth vs. Simpson,* 222 Pa. Super. Ct. 296, 294 A.2d 805 (1972). The matter of continuation is traditionally one within the discretion of the trial judge, and no prophylactic rule exists for determining when a denial of a continuance amounts to a violation of due process. Each case must be decided by balancing the competing interests, giving due regard to the facts presented."

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three days prior to the motion. As noted in the memorandum opinion, this Court had no indication of any interest in the case by Policy prior to Tuesday, May 8, 1979, when he called to Chambers of the trial judge asking for a continuance because he was going to San Francisco to return May 16, 1979. He called again to Chambers on Wednesday, May 9, 1979, stating he could not return in time from California for the trial. All of the dealings with the Court Administrator were with the attorney of record. Panella, who never objected to the trial of the case as scheduled. By the order of May 10, 1979 permitting Policy to participate, the Commonwealth had subpoenaed 29 witnesses for trial to appear on Monday, May 14, 1979. The trial itself commenced on Tuesday, May 15, 1979. There was but one witness examined in the absence of Attorney Policy. That witness was a civil engineer and surveyor who had prepared a drawing of the area in front of the Sheraton Inn where the incidents occurred. It was used merely for background and reference during the course of the trial. In addition, the jury was taken upon a view and there saw the same area as depicted on the survey.

In *Commonwealth vs. Simpson*, 222 Pa. Super. Ct. 296, 294 A.2d 805 (1972), eight months passed between arrest and trial to secure private counsel in lieu of a public defender. The denial of the continuance was not a deprivation of due process. Similarly, in *Commonwealth vs. Minifield*, 225 Pa. Super. Ct. 149, 310 A.2d 366 (1973), there was no abuse of discretion in not granting a continuance to a defendant who had been represented by the voluntary defender for more than six months and where the defendant had made no effort to obtain counsel for over 20 days after the was financially able to do so.

There is no effort to contend that Attorney Panella was not qualified to properly represent this defendant or that he did anything in the short absence of Attorney Policy which in any way prejudiced or harmed the defendant in the trial of the case. Just the opposite is true. Attorney Panella is a most competent attorney, having appeared with competence before this Court on other occasions in both civil and criminal matters.

WHEREFORE, THIS COURT CONCLUDES that there was no error in proceeding with the trial of the case.

II DID THE COURT ERR IN ADMITTING COMMONWEALTH'S EXHIBIT FIVE (5)?

Commonwealth's exhibit 5 is a gym bag which contained a flashlight, three sifters, a magnifying glass, a silver cup, microscope, lens cover box, glass cutting board, a book entitled "Cocaine Consumer's Handbook" and a photograph of the defendant. The defendant admitted that there was such a gym bag in the back of the car which he saw prior to it being thrown out of the window of the vehicle by his co-defendant during the course of the chase. In fact, it was thrown out just prior to the defendant's vehicle passing into the State of Ohio on Interstate 80. The object was seen being thrown out by Dana Frankenburg of the Narcotics Unit who was in hot pursuit and was subsequently found and made part of the evidence. The most recent declaration concerning the admission of physical evi-

dence is *Commonwealth v. Mayfield,* Pa. Super. Ct. , 396 A.2d 662 (1978). There the Court summarized the basic principle applicable to this case, page 668,

> "Physical evidence may be properly admitted despite gaps in testimony regarding custody."

Further, as stated in *Commonwealth vs. Miller,* 234 Pa. Super. Ct. 146, 339 A.2d 573 (1975), page 578,

> "There is no requirement that the Commonwealth establish the sanctity of its exhibits beyond all moral certainty. It is sufficient that the evidence, direct and circumstantial, establish a reasonable inference that the identity and condition of the exhibits remain unimpaired until they were surrendered to the Court."

It is sufficient if there is a proper foundation even though the object itself cannot be positively identified. Such affects the weight only of the evidence. *Commonwealth Nutter,* Pa. Super. Ct. , 389 A.2d 626 (1978). The determination of the admissibility of such demonstrative evidence is a matter within the discretion of the trial judge, and in the absence of an abuse of such discretion, the trial judge's decision must stand. *Commonwealth vs. Ford,* 451 Pa. 81, 301 A.2d 856 (1973).

The contention of the Commonwealth was that the defendant was bringing cocaine into Pennsylvania to be sold for $35,000.00. The strength of the cocaine was a factor to be determined. The equipment in exhibit 5 was testified as being the standard equipment a knowledgeable cocaine dealer would have for the determination or proof of the strength of the goods to be sold. Therefore, the evidence was material. The identification or ownership of the equipment in relation to the defendant was firmly established by a photograph of the defendant found with the material in the gym bag.

HENCE, THIS COURT CONCLUDES there was no error as to the admission of Commonwealth's exhibit 5.

III WAS THE ASSISTANT DISTRICT ATTORNEY'S REFERENCE IN HER CLOSING ARGUMENT TO DEFENSE COUNSEL USING THE NAME "WILLIE" AN ATTEMPT TO DRAW AN IMPROPER INFERENCE THAT THE DEFENDANT TOLD HIS COUNSEL OF THE NAME "WILLIE"?

At the preliminary hearing, the Commonwealth called only Chief Gary Lenzi. This Court has examined the record of the preliminary hearing and has directed that it be filed as a matter of record in this case. No reference is made of the name "Willie" in that record. At the trial, the first witness of the Commonwealth from the Narcotics Unit was Chief Lenzi. In his direct testimony he referred to the undercover agent Frank as "Billy Frank". The Assistant District Attorney referred to Frank as "Mr. Frank". On cross-examination, defense counsel asked,

> "Now is that the first time that Mr. Frank contacted you when I say Mr. Frank, I mean Mr. Willie Frank contacted you concerning the purchase of these two pounds of cocaine for the sum of $35,000.00?"

The Court, having no knowledge of William Frank using the name "Willie" in his undercover dealings with the defendant, suggested to the defense counsel that the name be corrected to either Billy or William. Counsel then asked the witness Lenzi,

> "Is he called Willie Frank or Billie Frank or William Frank? Answer: It's William or Bill Frank, Billy."

The witness, Billy Frank, followed Chief Lenzi and on direct examination for the first time disclosed that in addition to using a disguise of sorts in his preliminary dealings with the defendant, he failed to give his correct name. Rather, he told the defendant his name was "Willie". No last name was given. On cross-examination, counsel for the defendant asked Frank,

> "Now did it become perfectly obvious a short time after the fifth of March, 1978, that you and Mr. Sutley would have to testify? Answer: I had no knowledge whatsoever until two months ago. Question: So you're telling this jury that at no time until two months ago were you advised or were you told or were you consulted in any way about your testifying in court of law? Answer: That's correct."

The above testimony was given in the forepart of the week of May 15th. The preliminary hearing was held on February 2, 1979. Two months prior to the testimony is over a month after the preliminary hearing was held. Therefore, Frank did not know of any requirement to testify until after the defendant was bound over to Court. Therefore, there was no testimony in the preliminary hearing or at any time in the course of the trial down to the disclosure by Frank on direct examination that he used the name "Willie".

In the closing argument, the Assistant District Attorney stated,

> "He tells you that as a result of a telephone conversation he had with this defendant, he met the defendant at Howard Johnson's Motor Lodge on Route 19 south of Mercer. And ladies and gentlemen, I submit to you that one of the most crucial items of evidence that you would have heard in this courtroom in the two weeks came through in Mr. Frank's testimony at this point. If you may recall, when he was being cross examined, I objected to his being referred to as Willie. You will recall, I'm sure, that the Court instructed counsel concerning that matter and told him he was to address him as Mr. Frank, and that his name was William Frank or Billy Frank. You will recall, I'm sure, that Chief Lenzi at all times when he referred to Mr. Frank referred to him as Billy Frank. But defense counsel cross-examined him and referred to him as Willie. Now, I submit to you that Mr. Frank subsequently divulged that when he met this defendant, and when he was playing the part and not giving his last name, although he had the

> defendant's last name, he told the defendant his name was Willie in the Howard Johnson's parking lot on the night they met and first discussed this transaction. There was no testimony of any Willie being used at any preliminary hearing. To the contrary, Chief Lenzi told you he was attempting to at that time still keep him as a confidential informant and not divulging his name."

Everything argued by counsel for the Commonwealth was correct. The name Willie was not disclosed until Frank himself testified on direct examination following the testimony of Lenzi. The suggestion of defense counsel that the name Willie came out previously is not supported by the record. The Assistant District Attorney's argument is supported both by the record of the trial and the record at the preliminary hearing. Therefore, the Assistant District Attorney is not suggesting something untrue to the jury.

A prosecutor must limit his statements to facts and evidence and legitimate inferences that can be drawn therefrom. *Commonwealth vs. Harvell,* 458 Pa. 406, 327 A.2d 27 (1974); *Commonwealth vs. Revty,* 448 Pa. 512, 295 A.2d 300 (1972); *Commonwealth vs. Hill,* 479 Pa. 346, 388 A.2d 689 (1978); *Commonwealth vs. Long,* ____ Pa. Super. Ct. ____, 392 A.2d 810 (1978).

The American Bar Association Standards Relating to the Prosecution Function deal with this subject. Section 5.8(a),

> "...it is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw."

The Standards relating to closing arguments as set forth in Section 5.8 have been accepted in Pennsylvania. *Commonwealth vs. Joyner,* 469 Pa. 333, 365 A.2d 1233 (1976); *Commonwealth vs. Cronin,* 464 Pa. 138, 346 A.2d 59 (1975); *Commonwealth vs. Starks,* 479 Pa. 51, 387 A.2d 829 (1978).

Section 5.9 states that:

> "It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record...at trial...unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the Court may take judicial notice."

Every instance of alleged abuse does not require the granting of a new trial. The test is a set forth in *Commonwealth vs. Olivencia,* ___ Pa. Super. Ct. ___, 402 A.2d 519, 524 (1979),

> "The language must be such that its unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh evidence and render a true verdict. The effect of such remarks depends upon the atmosphere of the trial, and the proper action to be taken is within the discretion of the trial court."

The test has also been stated in *Commonwealth vs. Smith,* 477 Pa. 505, 384 A.2d 1202 at 1205 (1978),

> "...an error cannot be held harmless unless the Appellate Court determined that the error could not have contributed to the verdict. Whenever there is a 'reasonable possibility' that an error might have contributed to the conviction the error is not harmless."

In considering the effects of alleged improper remarks, the Court can rely upon the atmosphere of the trial in determining whether it is necessary to set aside a verdict. *Commonwealth vs. McHugh,* 187 Pa. Super. Ct. 568, 145 A.2d 896 (1958).

It must be recognized that a district attorney must have reasonable latitude in fairly presenting a case to the jury and that the trial judge must have reasonable discretion in deciding whether the bounds of propriety have been exceeded. *Commonweath vs. Starks,* 479 Pa. 51, 387 A.2d 829 at 833 (1978).

Commonwealth vs. Long, supra, stands for the same principle as enunciated in commentary 5.9 that the prosecutor cannot argue facts outside the record which are not matters of common public knowledge based on ordinary human experience. This Court believes that the argument that the name "Willie" came to the defendant's attorney from his client is a proper argument being a reasonable inference based on the evidence. Because of the defendant's attorney's contention at side-bar that the information came to him from the preliminary hearing, this Court secured and filed a copy of the transcript of the preliminary hearing which clearly demonstrates there was no reference to the name "Willie" or any other name for the informant at the preliminary hearing.

THEREFORE, THIS COURT CONCLUDES that the Commonwealth was within the principles established by the American Bar Association Standards Relating to the Prosecution Function and the cases decided in this Commonwealth thereunder. It is similar to *Commonwealth vs. Tolassi,* ____ Pa. Super. Ct. ____, 392 A.2d 750 (1978) where many pictures at the scene of the destruction of a construction site were introduced into evidence with figures in the background. The Assistant District Attorney was properly permitted to argue that the figures resembled several of the defendants for he was merely arguing a reasonable conclusion from the testimony. In *Commonwealth vs. Jarvis,* ____ Pa. ____, 394 A.2d 483 (1978), the prosecution referred to a relationship between the defendant, the victim and a female companion as a "love triangle". The evidence was that the female had been seeing both the defendant and the victim. Being a reasonable deduction from the evidence it was held not to be error. Even if the commonwealth makes reference to certain matters allegedly testified to at a preliminary hearing claiming that such evidence would have bolstered an in-court identification of the defendant when in fact there was no such evidence, it has been held that a new trial is not required when it is determined that a jury is not misled

thereby. *Commonwealth vs. Rodgers,* ____ Pa. Super. Ct. ____, 393 A.2d 876 (1978).

The challenged comment in the instant case did not suggest there was evidence previously given which would bolster the Commonwealth's position. Rather, the Commonwealth argued that the only source of the information of the name "Willie" which had been jealously guarded by the Commonwealth was through the defendant himself despite his denial on the stand at the trial that he had any meeting with the informant Frank at the Howard Johnson's restaurant in Mercer prior to the consummation of the drug transaction involved in this case. We believe this to be a proper argument but if concluded arguendo to be improper the evidence was so overwhelming against the defendant as to his presence and participation in the criminal events that it was harmless error under the Standards as set forth in this opinion.

IV DID THE COURT ERR IN FAILING TO GRANT A CONTINUANCE TO THE DEFENSE TO SECURE LIEUTENANT WHITESIDE, A WITNESS, THEREBY DEPRIVING THE DEFENDANT OF A FAIR TRIAL?

The testimony of the Commonwealth was that there was $35,000.00 in cash in the defendant's motor vehicle driven from the scene along with a hostage in a hail of bullets. The car was chased for approximately 10 miles throughout Pennsylvania before it got onto Interstate 80 and was eventually stopped going west just beyond the Pennsylvania-Ohio border in Ohio. Deputy Sheriff Anthony Beall, of Trumbull County, Ohio, received a radio message concerning this event. He proceeded toward the Pennsylvania border on Interstate 80 when he was dispatched directing him to the area. Upon arriving at the scene he found two men in handcuffs being placed in a marked Hermitage police department vehicle and two Mercer County Narcotics agents. After the defendants were taken in a police

cruiser to jail, the deputy remained in the area of the vehicle in order to secure it until a wrecker arrived. He noted bullet holes in the right front door of the passenger side. The windows were down. In examining the holes, he found a bag of money in the car. The money was in a brown bag similar to that in which groceries are held. The deputy looked into the bag and saw that there was "a lot of money." He rolled the bag back up, closed the door of the car and radioed that one of the packages that was being looked for was found. The other package was to have contained cocaine. He did not count the money. Two agents of the Narcotics Unit returned to the scene. The deputy took the money and turned it over to his lieutenant. This testimony was received on May 23rd, being the 7th trial day. The name, Lieutenant Whiteside, was disclosed early in cross-examination of the deputy during the morning of May 23rd. Following the completion of another witness and just prior to lunch of that date, Attorney Policy for the defense suggested that he had a possible or potential witness and he was going to have to run out and try to serve a subpoena. He did not disclose the name of the witness. He inquired as to how much more time the Commonwealth would take to complete its case and requested permission to give an opening and start his testimony the following day. The Court indicated that it had never made it a practice to stop a case to let either the district attorney or the defense run after witnesses in that it felt it was a bad practice. There was no motion on that day of the 23rd of May, 1979.

On the morning of May 23, 1979, shortly prior to the completion of testimony, counsel for the defendant approached the bench stating that they had learned for the first time, the day previous, that Lieutenant Whiteside was the person to whom the money had been delivered. Attorney Policy stated that he had found Lieutenant Whiteside the night before and talked to him at some length. He said another attorney, without naming him in Trumbull County, had talked

to him that morning at length; that Whiteside indicated that he would not appear unless forced to do so by subpoena. An address was given and a phone number in Warren, Ohio, and his place of employment also being in that city in the State of Ohio. He was no longer a full time employee of the Sheriff's department. Questioning whether this Court had the power to order him to appear, Attorney Policy requested the Court through the prosecutor's office to request the appearance of the witness either that afternoon or the following morning. Despite objection by the Commonwealth that it did not have the power to subpoena across the state line, the Court entered an Order directing the District Attorney to contact Lieutenant Leskovac who was the witness's superior officer while the witness was on the force to inform Whiteside his presence was required in Court the following morning at 9:30. The Court brought to counsel's attention that if the witness did not appear, counsel should not come back to the Court because of defense counsel's failure to exercise the proper procedure through the Interstate Rendition of Witnesses Act bring the witness into court. Neither side knew the name Lieutenant Whiteside until the previous day. At 1:55 p.m. of that same day, May 23, 1979, counsel for the defendant presented a petition to secure attendance of the witness. This is authorized under the Act of July 9, 1976, P. L. 586, No. 142, Section 2 [42 Pa. C. S. A. 5964]. The Court immediately entered the proposed order directing that Joseph Whiteside be taken into custody and delivered to an officer of this State to assure his attendance on May 24, 1979 at 9:30 o'clock, a.m. The Clerk of this Court sent the certified copy of the petition and order on May 23, 1979 but it was not received by the Courts of Trumbull County until May 25, 1979. The verdict, however, was received at 1:15 a.m. of that day. At about 4:21 p.m., on Wednesday, May 23, 1979, the Court instructed the jury there was potentially one more witness for the defense who may or may not appear the following morning at 9:30 a.m. The jury was further

instructed that despite that the Court was going to proceed with rebuttal testimony and complete all of that testimony that day except one witness. The witness to be called the next morning for the defense would be permitted to testify as well as any sur-rebuttal to be produced by the defense. The Commonwealth then called the witness, David Allen, the Chief of Detectives of the Austintown Police Department. The following morning, Whiteside failed to appear. The defense requested a continuance. All the testimony with the exception of Whiteside had been received. The case was then in its eighth (8th) day. The Court refused the continuance. The closing arguments and the charge were given and the jury retired to deliberate.

The grant or refusal of a continuance lies within the sound discretion of the trial court and its action will be reversed only when there is found to be an abuse of discretion. *Commonwealth vs. Howard,* 466 Pa. 445, 353 A.2d 438 (1976); *Commonwealth vs. Simmons,* 361 Pa. 391, 65 A.2d 353, cert. den. 70 Supreme Court 96, 338 U.S. 862, rehearing denied 70 Supreme Court 181, 338 U.S. 888 (1949). The rule has also been stated that an appellate court will not reverse a trial court's denial of a continuance without a palpable and prejudicial abuse of discretion. *Commonwealth vs. Kishback,* 247 Pa. Super. Ct. 557, 373 A.2d 118 (1976). It has also been phrased that the denial of a request for continuance will not be granted unless it's so arbitrary that it violates due process. *Commonwealth vs. Merritt,* 227 Pa. Super. Ct. 257, 323 A.2d 875 (1974).

In *Commonwealth vs. Scott,* 469 Pa. 258, 365 A.2d 140 (1976), it was held the grant of a continuance to secure a material witness is within the lower court's discretion. It cited as authority *Commonwealth vs. Smith,* 442 Pa. 265, 275 A.2d 98 (1971) for the criteria to determine whether there has been a proper exercise of that discretion. Five factors are cited. One, the necessity of the witness to strengthen the defendant's case. Two, the essentiality of the witness to the defendant's defense.

Three, the diligence exercised to procure his presence at trial. Four, the facts to which he could testify. Five, the likelihood that he could be produced at the next term of court. In *Smith, supra,* there was a reversal of the lower court in the refusal to grant the continuance. The Supreme Court noted particularly, however, that the defendant's sole defense was alibi and the desired witnesses were alibi witnesses. Therefore, it was obvious that the denial prevented the defendant from presenting his only defense. On the other hand, if the testimony desired is merely cumulative or available from another source, a continuance may properly be denied. *Commonwealth vs. Howard, supra,* wherein *Franklin vs. South Carolina,* 218 U.S. 161, 168, 30 Supreme Court 640, 643 (1910) is cited as authority, at page 447,

> "'It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law.'"

Although we have found no case which articulates a more restrictive rule for continuance during the course of a trial than pre-trial it is apparent that there are substantial additional elements for consideration. This is particularly true where a trial that has gone on for a number of days and there is a concern of the jurors becoming contaminated or forgetting previous testimony. As to the latter, if the continuance had been granted, it might well have required more than one day to have attempted to get Lieutenant Whiteside into Court. The case was approaching the weekend. It could have required the jury to wait from Thursday morning to Monday morning after 8 days of testimony and no other witness to be produced. *Commonwealth vs. Drew,* 190 Pa. Super. Ct. 478, 154 A.2d 285 (1959) is a case where a request was made for continuance during trial. The witness, although 10 feet away from a drug transaction of a busy downtown street in Philadelphia, might

have seen the transaction and therefore be a eyewitness, there was no testimony that he did see the transaction. In fact the Commonwealth's witness stated that he did not believe that the desired witness saw the transaction. Not being an eyewitness to the transaction, the Court held there was no abuse of discretion in refusing the continuance during the course of the trial to produce the witness. That trial had proceeded 4 days as opposed to the 8 days already consumed in the instant case. Even more important, the defendant does not contend that there was not a bag of money in the car. His basic story was that he had lent his car to his friend, Pat Harbison and on the day of this incident he was to receive his car back. Harbison called him on the afternoon of this event, being a Sunday, and asked if he could use his car a little longer, perhaps another day or two. Defendant said he wanted the car back that night. Harbison said then he would come over to the defendant's girlfriend's house to drop the car off. As the defendant was being taken back to his house, Harbison asked the defendant, "... if I could drive him up to Pennsylvania a second ..." The defendant admitted that in the back seat of the car there was a gym bag and a grocery bag and a square brown box. Upon arriving at the Sheraton in Pennsylvania, he said a person came out of the Sheraton and got into the car and asked Harbison, who was in the back seat, if he had the money.[7]

The defendant testified that Harbison passed up the brown bag to the front seat and Sutley, the friend of the informant, opened it, took out the green money envelope, opened it and started leafing through the money. It came from a plastic bag and there was a "lot of money there."

To now contend through Lieutenant Whiteside that the money was not turned over to him despite the testimony of the

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[7]This is absolutely contrary to the Commonwealth's position that William Frank produced the money which was passed in the presence of the undercover agents to William Sutley who took it into the car.

deputy sheriff who found it in the car and testified he gave it to Lieutenant Whiteside may establish the possibility of another crime but is not in contradiction of the testimony of the defendant that a lot of money was present in the car. It introduces a collateral issue which does not assist in determining the guilt of the defendant of the principal offenses of which he was connected.

HENCE, THIS COURT FINDS NO ERROR.

V DID THE COURT ERR IN ITS STATEMENT AT THE TIME OF RULING UPON A QUESTION DURING CROSS-EXAMINATION BY THE DEFENSE OF A REBUTTAL WITNESS FOR THE COMMONWEALTH THAT DEFENDANT'S FATHER WAS AVAILABLE TO TESTIFY?

The Commonwealth's contention was that when the members of the Narcotics Unit closed in on the defendant's vehicle, firing occurred from within the vehicle upon the officers striking Dana Frankenburg, an officer of the Narcotics Unit, under the eye. The defendant testified on his own behalf and stated that not only did he not have a gun that night but that he did not possess a gun on that night. Testimony was further developed that he and his father resided in an apartment together. Further, the defendant testified that the only guns that would have been located in the apartment were war souvenirs that his father had brought back from service which were in locked cabinets. Detective David Allen, of the Austintown, Ohio, police department, testified he secured a search warrant and carried out a search of the defendant's residence on the night of March 5, 1978. Located upon the premises were 11 rifles, 2 pistols, 2 foreign rifles, 1 German and 1 Japanese, and the United States Army U.S. Automatic. In addition, a .38 automatic completely disassembled was taped under a drawer under a hallway.

On cross-examination, Detective Allen was asked by defendant's counsel, whether the defendant's father had told the detective that the guns were in fact his. The defendant's father had been seated in the front row of the audience section of the courtroom throughout the trial. Counsel for the Commonwealth stated, "Object, Your Honor, it would be hearsay. Mr. LaGuardia can testify if he said that. The Court: Sustained." Defendant's counsel stated, "I'm referring to the father, Your Honor, who was there at the time of the search." The Court: "Yes, sustained. He is present in Court, as I understand it, he is available to be called." Defendant's counsel made no motion nor did he ask for any cautionary instructions. The defense did assign the comment as both a basis for a new trial and in arrest of judgment.

In its charge in accordance with the authority of *Commonwealth vs. Black*, 186 Pa. Super. Ct. 160, 142 A.2d 495 (1958), the Court charged the jury,

> "In this case, as you think of the persons who came before you, you may say, there are certain people I might have wanted to have heard, witnesses who did not appear. What do you do about that? What is our prerogative? The rule is that if a witness is not called by a side whom the jury would normally expect them to be cooperative or friendly to support their position, that the jury may in fact assume that their testimony would be against that side. But, in order for that rule to apply, it must be shown that the witness was not equally available to both sides. I inform you in this case there is no evidence that any witness was not equally available to both sides. And therefore, you may not use the rule of adverse inference against either side as to any witness who was not called or potential witness."

There was no request for additonal instructions to make specific reference to the defendant's father or any other witness. The test of prejudicial effect of a comment by a court is well set

forth in *Commonwealth vs. Anskate,* 221 Pa. Super. Ct. 122, 289 A.2d 156 (1972), at pages 124-125,

> "It must be determined from all the circumstances whether a remark has a prejudicial effect; there is no fixed rule applicable to every case. An accepted guide in determining prejudicial effect is that, if the remark may be said with fair assurance to have had but a slight effect upon the jury, if any at all, and one is not left in doubt that it had no substantial influence in the case, it will not vitiate an otherwise fair trial."

Further, quoting from *Kotteakos, vs. U.S.,* 328 U.S. 750, 66 S. Ct. 1239, page 125,

> "'If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The rule in *Commonwealth vs. Anskate, supra,* has been reaffirmed by our Appellate Courts in *Commonwealth vs. Levenson,* 225 Pa. Super. Ct. 318, 303 A.2d 838 (1973), where it was held that the comment of the court did not require a reversal. There a description was given to the defendant as being 6'2" tall and weighing 152 pounds. The court then made a comment, "Is that dripping wet with clothes on?" This was contended strenuously by defense counsel to be a prejudicial remark requiring a mistrial. The court immediately apologized to the jury for the levity injected by the court and informed the

jury in definite terms that it should be disregarded. This was held not to be error. Similarly, in *Commonwealth vs. Vorhauer,* 232 Pa. Super. Ct. 84, 331 A.2d 815 (1974), the rule of *Commonwealth vs. Anskate, supra,* was held not to be violated where after the assistant district attorney referred to one of the robbers as "the taller gentleman" the trial judge commented, "You use the word gentleman. Don't you think that's a little strained? . . . I would call them men." Although prior to *Commonwealth vs. Anskate, supra,* a new trial was not required in *Commonwealth vs. Phillips.* 183 Pa. Super. Ct. 377, 132 A.2d 733 (1957), where the following by-play occurred between counsel for the defense and the trial court. On cross-examination of a witness, defense counsel asked a series of questions as to whether a witness always worked night shift. The district attorney objected as being irrelevant. The court said, page 381, "The objection is sustained. Do you take the position, Mr. Marks (defense counsel), that if a person is working irregularly he would be beat up but if he is working regularly he can't be beat up?" To this the defense counsel answered, "No, I don't think he ought to be beat up anytime." The trial court then concluded, "Well, then let's get to the assault and battery case." A new trial was not ordered.

In *Commonwealth vs. Jacobs,* 247 Pa. Super. Ct. 373, 372 A.2d 873 (1977), the improper comment on the lack of proof from the defense was cured by instructions similar to that used in this case.

Rather, this Court is of the opinion that the isolated comment of the Court is of much less signficance than that of *Commonwealth vs. England,* 474 Pa. 1, 375 A.2d 1292 (1977), where a new trial was not required. In that first degree murder case, the court commented to the defense counsel, inter alia, "We don't need any speeches, Mr. Evans, . . . I have permitted you great latitude now. I think we have gone far enough." Subsequently, "We are trying the events of January 24, 1971,

not the entire prison system, Mr. Evans." And finally, following the glance at a clock in the courtroom by defense counsel, "That clock won't help you back there, Mr. Evans. It is about 3:12 now." Recognizing the judge occupies an exalted and dignified position and that he is the one person to whom the jury looks for guidance, the court held that the matter must be viewed in consideration of the rule that every unwise or irrelevant comment made in the course of a trial by a judge does not compel the granting of a new trial. Such is required only when the remark is prejudical, that is, when it is of such a nature or substance or delivered in such a manner that it may reasonably be said to deprive the defendant of a fair and impartial trial.

In the case at bar, defendant's counsel obviously was attempting to get before the jury an alleged statement of the father who was available in court to testify. He should have been called had the defendant wished to produce the father's statement as to the ownership of the gun. Instead, defendant's attorney followed an improper procedure to which objection was sustained. Not being content, counsel came back immediately to the Court as if there had been some inability of the Court to recognize to whom reference was made when addressed as Mr. LaGuardia. It was possible, of course, that either of the two Mr. LaGuardias, being the defendant or his father, was referred to. The Court wished to make it clear that it understood the reference to be to the father stated by counsel. There was no purpose other than clarification by the comment and in this Court's opinion was not error.

VI DID THE COURT ERR IN ITS CHARGE TO THE JURY CONCERNING THE LAW OF ACCOMPLICE?

The Court instructed the jury as follows,

> "Now, as to the liability for conduct of an accomplice. I have dealt with this throughout and said we would come back to it. You will find the defendant—if you find that

the defendant was participating with another person in the commission of this crime, you look to see whether or not either he or the other person is an accomplice of each other. You may find the defendant guilty of a crime without finding that he personally performed the acts or engaged in the conduct. A defendant is guilty of a crime if he is an accomplice of another person who performs that crime. He is an accomplice if with the intent of promoting or facilitating the commission of the crime he solicits, commands, encourages or requests another person to commit the crime, to aid him in the commission of the crime, or attempt to aid him in the commission of the crime, or if he or the other person together are in the planning or commission of the crime. However, a defendant is not an accomplice if before the other person commits the crime he stops his efforts to promote or facilitate the commission of the crime, and he deprives the other person from carrying out the crime, or gives timely warning to law enforcement authorities or otherwise makes a proper effort to prevent the commission of the crime.

In this case, if you accept the testimony of the defendant, he didn't know there was any crime. He didn't know what was going on during the course of the acts allegedly occurring in the car. If he didn't know, if you accept that, it would be difficult to conceive of how he could withdraw from the commission of a crime that he didn't know was going on. It is possible that he did know, and that he attempted to withdraw from the commission of the crime, but in order to do that, he must stop his efforts towards the commission of the crime, and ne must deprive the other party of the opportunity to go through with it, or give timely warning to law enforcement officers, or otherwise make a proper effort to prevent the commission of the crime."

At the conclusion of the charge, defendant's counsel took exception to the above charge stating.

> "I think this statement had a connotation that's the only way you cannot be an accomplice, because if he didn't know anything about the crime, he wouldn't be an accomplice. I think that should be clarified."

The defendant preserved his position in his motion for new trial and in his motion in arrest of judgment claiming it was error to not clarify to the jury the charge on accomplice in that it was claimed the charge left the jury with the impression that the only defense the defendant had was to withdraw. Such a construction is absolutely contrary to the charge. After informing the jury that if the defendant's testimony is accepted that he had no knowledge of the occurrence of the crimes it would be difficult to see how he could withdraw, the Court immediately instructed the jury,

> "It is possible that he did know, and that he attempted to withdraw from the commission of the crime. . . ." And further,
>
> ". . . he must stop his efforts towards the commission of the crime, and he must deprive the other party of the opportunity to go through with it, or give timely warning to law enforcement officers, or otherwise make a proper effort to prevent the commission of the crime."

This was a paraphrase of the manner in which a person may terminate his complicity as provided by Section 306 of the Crimes Code of 1972, Subsection (f)(3).[8] In this Court's opinion there was no need of a clarification for the rule was properly stated in the charge. Further, there was no way that this Court could have referred to favorable testimony concerning defendant withdrawing from the criminal scheme because of the position of the defendant that he was not involved in the scheme at all and had no knowledge of it. This position was, of course, contrary to that found by the jury based on evidence beyond a reasonable doubt.

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[8] Act of December 6, 1972, P.L. , No. 334, Section 1 [18 C.P.S.A. 306].

A trial court is not required to give instructions when the subject was adequately and correctly covered in the basic charges. This is true even where there are points for charge on the subject not here present. *Commonwealth vs. Kahley*, 467 Pa. 272, 356 A.2d 745 (1976); *Commonwealth vs. Jones*, 452 Pa. 569, 308 A.2d 598 (1973); *Commonwealth vs. Butler*, 405 Pa. 36, 173 A.2d 468 cert. den. 82 S.Ct. 384, 368 U.S. 945 (1961). In the case at bar the defendant's attorney did not inform the Court what he wished to be done in the way of an additional instruction other than state, "I think that should be clarified." In this court's opinion there was no need to clarify for the instruction was properly given. Only by a tortuous misconstruction and avoidance of much of what was stated to the jury concerning the subject could it be claimed that a clarification was necessary. In fact, the Court could have refused to charge on the question of withdrawal in view of the testimony of the defense. By inserting the possibility of withdrawal, the Court gave to the defense more than it was entitled.

HENCE, WE CONCLUDE THERE WAS NO ERROR

VII DID THE COURT ERR IN PERMITTING THE COMMONWEALTH TO AMEND THE INFORMATION IMMEDIATELY PRIOR TO TRIAL?

Defendant was initially charged, inter alia, with possession of cocaine with intent to deliver, simple possession of cocaine, and conspiracy to possess cocaine with intent to deliver. For no explainable reason, conspiracy to possess cocaine was not charged in the criminal information. Immediately prior to the selection of the jury in a pre-trial conference, Commonwealth moved to amend the information to include the charge of conspiracy to the possession of cocaine. The defendant objected. The Court granted the amendment. The jury found the defendant guilty of conspiracy to possession with intent to deliver along with possession with intent to deliver. The offense of conspiracy as to possession of cocaine

with intent to deliver contain all of the necessary elements of conspiracy as to possession of cocaine. The jury was informed at the very conclusion of the charge that if it found the defendant guilty of conspiracy to possess cocaine with intent to deliver it should not return a verdict as to conspiracy of possession of cocaine in that it was a lesser included offense. The jury followed those instructions. Therefore, the defendant's objection to the submission of the crime of conspiracy to possess cocaine could be dismissed on the well recognized principle that where an indictment contains several counts, one of which is allegedly defective, it will not invalidate the conviction upon a good count. *Commonwealth vs. Warner*, 209 Pa. Super. Ct. 215, 225 A.2d 98 (1966), U.S. cert. den. at 389 U.S. 986.

This Court does not consider, however, the charge of conspiracy as to possession of cocaine to have been improperly added. IT CONCLUDES it is well within Pennsylvania Rule of Criminal Procedure 229 (formerly Pennsylvania Rule of Criminal Procedure 220). The applicable law is well set forth in *Commonwealth vs. Stanley*, Pa. Super. Ct. , 401 A.2d 1166 (1979), at page 1175,

> "The purpose of Rule 229 is to insure that a defendant is fully appraised of the charges against him, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed. (Cases cited) In effecting this purpose, the courts of this commonwealth employ the test of whether the crime specified in the original indictment or information involve the same basic elements and evolve out of the same factual situation as the crimes specified in the amended indictment or information. If so, then the defendant is deemed to have been placed on notice regarding his alleged criminal conduct. If, however, the amended provision alleges a different set of events, or the elements or defenses to the amended crimes are materially different from the elements or defenses to the crime originally

charged, such that the defendant would be prejudiced by the change, then the amendment is not permitted."

In *Commonwealth vs. Jones*, 250 Pa. Super. Ct. 471, 378 A.2d 1245 (1977), the defendant was charged with various crimes including aggravated assault and conspiracy to commit robbery. On motion, the conspiracy to commit robbery charge was dismissed at the conclusion of the commonwealth's case, but the court simultaneously permitted the amendment of the indictment to change the charge of conspiracy to commit robbery to conspiracy to commit aggravated assault. It was contended this violated Pennsylvania Rule of Criminal Procedure 220 (Rule 229 is almost verbatim, the former Rule 220). The court held there was no violation of Rule 220 because the criminal objective of the conspiracy as to commit robbery and the overt act in furtherance thereof was the aggravated assault. Therefore the amendment merely cured a defect in that the indictment still charged conspiracy but the criminal objective had now become criminal assault. As in the instant case the defense counsel made no effort to request a continuance for further preparation nor did it claim surprise.

In *Commonwealth vs. Fowler*, Pa. Super. Ct. , 393 A.2d 844 (1978), an amendment was permitted after the commonwealth had rested its case and the defense had concluded cross-examination of the prosecution witnesses. The amendment was to permit the inclusion of conspiracy to commit aggravated assault. The court concluded there was no error because the defendant had notice of the charge against which he must defend. In this case the defendant had been charged with aggravated assault.

A substantive amendment is defined in *Commonwealth vs. Herstine*, Pa. Super. Ct. , 399 A.2d 1118 (1979), through footnote 2, page 1120,

> "A substantive amendment is one that changes the nature or grade of the offense charged."

Relying upon *Commonwealth vs. Jones, supra,* as authority,[9]

IT IS THE CONCLUSION OF THIS COURT that the amendment was proper and well within the Court's authority.

VIII WAS THE COURT'S STATEMENT AT SIDE-BAR AN INDICATION THAT THE JUDGE WAS NOT IMPARTIAL AND THAT A NEW TRIAL IS REQUIRED?

At the conclusion of the defendant's testimony and just prior to receipt of rebuttal by the Commonwealth, after eight (8) days of trial, a request was made for an offer at side-bar. The defendant had previously testified that he did not own any guns on the night of this crime. The factual matters concerning this issue were discussed in part in this opinion under V. Chief of Detectives, Daniel Allen, was to be the Commonwealth's only rebuttal witness. It was proposed he would testify that a search was made of the defendant's premises of the night of the arrest and that multiple handguns, rifles and guns were found in the apartment hidden under pieces of furniture. Further, that a .38 automatic was taped under a cabinet in a hallway and that there were no guns in locked drawers. In an effort to prevent this testimony from being received, one of the many things started to be said by defendant's counsel was, "The relevant thing is, the boy—". The Court corrected counsel stating, "He is not a boy, he is 24 years of age." Counsel then said at side-bar, "I knew him, though. Maybe the defense of the thing is getting to me a little bit." The Assistant District Attorney pointed out that guns were found in the execution of a

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[9] An example where an attempted amendment was held to be error is *Commonwealth vs. Herstine,* Pa. Super. Ct. , 399 A.2d 1118 (1979) where a defendant was charged with retail theft. Information was permitted by the lower court to be amended to include a second offense for retail theft. This amendment charged a different offense which was also a greater offense and therefore a substantive matter. It was held to be violative of the Pennsylvania rule of Criminal Procedure 229.

search warrant and there was no suppression motion. Counsel for the defendant said there wasn't a search warrant. Anticipating the defendant might at that late date now want to attempt to suppress the results of the search, the Court stated, "You're too late." Counsel for the defendant responded, "Judge, I feel you are going to prejudice this kid", to which the Court responded at side-bar out of the jury's hearing,

> "Maybe he should be. If a person in a home has a number of guns, one of which is strapped under a table, being a drawer, and he claims on the night of the occurrence he didn't have a gun, it would seem to me the logic might support the conclusion that this was evidence that he may have had a gun."

There was no motion of any sort by the defendant following the comment of the Court. In determining whether a trial judge is prejudice, the entire record must be examined. *Commonwealth vs. Warnes,* 209 Pa. Super. Ct. 215, 225 A.2d 98 (1966). There is not a scintilla of evidence of prejudice by the trial judge immediately prior or subsequent to the comment. It is acknowledged that an impartial judge is fundamental to fair trial. *Commonwealth vs. Bastone,* 466 Pa. 548, 353 A.2d 827 (1976). In examining the effect of alleged prejudicial conduct, one must consider who is the fact-finder. In this case the jury was the fact-finder. In *Commonwealth vs. Whitson,* 461 Pa. 101, 334 A.2d 653 (1975), at side-bar, the trial court commented upon the defense's counsel motion for new trial as being frivolous. This was out of the hearing of the jury. As in that case, such comment could hardly have prejudiced the defendant any more than this defendant was prejudiced by the alleged improper comments on the trial court.

HENCE, THIS COURT FINDS NO ERROR.

IX DID THE COURT ERR IN AFFIRMING THE COMMONWEALTH'S SUPPLEMENTAL POINT FOR CHARGE DEALING WITH THE LAW OF OHIO CONCERNING EXTRADITION?

The defendant took no exception to any of the four points for charge of the Commonwealth dealing with flight. Nor did the defendant except to the charge on flight prior to the reading of the District Attorney's four points for charge. The Commonwealth's contention throughout was that there were two phases to the flight. The first was the over 10 mile high-speed chase through the rural area of Shenango Township while the defendant tried to find his way back onto Route (Interstate) 80 down to his stopping once he was within the Ohio border. The second was defendant's failure to return to Pennsylvania once his multiple extradition hearings had been completed and an order of extradition became final. It is only the point for charge as to the latter contention that is now attacked through the defendant's motion for new trial and in arrest of judgment. There was no exception at the conclusion of the charge. The defendant's contention concerning the alleged error in reading and affirming the Commonwealth's supplemental point for charge could be dismissed on this basis alone. *Commonwealth vs. Martinez.* 475 Pa. 331, 380 A.2d 747 (1977); *Commonwealth vs. Corkan,* 467 Pa. 33, 354 A.2d 537 (1976); *Commonwealth vs. Danzy,* 225 Pa. Super. Ct. 234, 310 A.2d 291 (1973). Considering the matter on the merits, however, the charge now objected to was taken from Ohio Revised Code Sections 2935.29, .30 and .31. It dealt with the Ohio statute dealing with arrest by officers of other states. It was to explain the procedure in the State of Ohio, being contrary to the procedure in the State of Pennsylvania, and why it was necessary to extradite the defendant in this case. The point informed the jury that a defendant is permitted to go on bail until extradition is ordered by the Governor of Ohio. The defendant does not

claim that the point incorrectly states the Ohio law. Rather, the defendant contends that the point should not have been given at all. Nor does the defendant contend that the Court should not have charged generally on flight.[10]

Evidence of the defendant's flight following a warrant for defendant's arrest is probative of consciousness of guilt. *Commonwealth vs. Smith,* 250 Pa. Super. Ct. 460, 378 A.2d 1239 (1977). In that case, testimony of the bondsman as to the purchase of the bond, the amount of the bond and the defaulting of the bond was admissible as evidence which combined with the flight showed consciousness of guilt. This defendant was likewise on bond and failed to appear as the evidence disclosed, and was required to be arrested. He testified he was not advised by his attorney and implied that the attorney was derelict in failing to do so. That defense was covered in the charge. The jury was instructed that if it accepted the testimony of the defendant the rule as to flight concerning failure to appear was clearly not applicable.

In consideration of all the evidence and charge concerning the question of flight, WE SEE NO ERROR.

X DID THE COURT ERR IN PERMITTING EVIDENCE CONCERNING THE RIFLES FOUND IN THE DEFENDANT'S HOME?

This subject was previously dealt with in this Court's discussion of Point V. It arises from defendant testifying that not only did he not have a gun with him on the night of the occurrence but that he did not own a gun. Testimony was then produced of a search of the apartment in which he resided with his father which uncovered 11 rifles, 2 pistols, 2 foreign rifles,

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[10] Flight is a proper subject to charge upon in Pennsylvania. *Commonwealth vs. Jones,* 250 Pa. Super. Ct. 471, 378 A.2d 1245 (1977); *Commonwealth vs. Coyles,* 415 Pa. Super. Ct. 379, 203 A.2d 782 (1964); *Commonwealth vs. Sanabria,* 478 Pa. 22, 385 A.2d 1292 (1978).

one German and one Japanese, and a U.S. Army Automatic, as well as a .38 automatic disassembled and taped underneath the drawer in a hallway in the apartment. The statement by the defendant that he did not possess a gun was illicited by his own attorney on direct examination. The admission of rebuttal evidence on collateral matters is entrusted to the sound discretion of the trial court. *Commonwealth vs. Farrior,* 446 Pa. 31, 284 A.2d 684 (1971); *Commonwealth vs. Eberhardt,* 164 Pa. Super. Ct. 591, 67 A.2d 613 (1949).

The Court's discretion is, of course, not unfettered. *Commonwealth vs. Steinberg,* 189 Pa. Super. Ct. 381, 150 A.2d 131 (1959). Further, if, of course, is possible that the probative value of the evidence is outweighed by counter-veiling policy considerations such as evidence of the commission of other crimes by a defendant because of the unfair prejudice which might result. *Commonwealth vs. Allen,* 448 Pa. 177, 292 A.2d 373 (1972); *Commonwealth vs. Williams,* 230 Pa. Super. Ct. 72, 327 A.2d 367 (1974).

In a case involving a gun, testimony similar to that admitted in the instant case was held to be proper. *Commonwealth vs. Hickman,* 453 Pa. 427, 309 A.2d 564 (1973). There on cross-examination, as opposed to direct examination as in the instant case, the defendant was asked whether he had ever owned a .32 caliber Beretta pistol and whether he had ever been to Hughes Gun Shop for repairs of such a pistol on January 2, 1970. Defendant answered in the negative. Hughes, the owner of the gun shop was called on rebuttal. He testified that the defendant brought a Beretta pistol to him for repair on January 2, 1970 and that he fired several bullets into a bullet trap which were later recovered. The court held that these two subjects were proper examination. Unfortunately, the Commonwealth further testified that bullets had been accumulating the trap for 10 years and that approximately 80 .32 caliber bullets were retrieved and examined. Two of these bullets corresponded to the bullets of the murder weapon. The latter

was held to be error. It was concluded that the testimony, although enhancing the possibility that the gun had been brought in by the appellant, was a murder weapon, did not establish the probability that such was true. Therefore, it was held to be too remote. In *Commonwealth vs. Roots,* 452 Pa. 535, 306 A.2d 873 (1973), the defendant attempted to establish that the victim had participated in a robbery and that she, the defendant, had gone to the scene of the robbery as a witness. The commonwealth on rebuttal produced a night clerk who testified that the robber was dressed differently than described by the defendant thereby attempting to demonstrate that the decedent was not the robber and that the only woman who was present acted as a lookout for the robber and not as a mere witness. This testimony was held to be proper to rebut statements in the defendant's confession especially favorable to her.

In *Commonwealth vs. Libonati,* 346 Pa. 504, 31 A.2d 95 (1943), the defendant was charged with murder. He testified on cross-examination that he never called any person except the deceased by a certain telephone. In rebuttal, the commonwealth's witness testified of defendant's threats of bodily harm over that telephone. This was held to be proper rebuttal.

Finally, in *Commonwealth vs. Albert,* 198 Pa. Super. Ct. 489, 182 A.2d 77 (1962), the defendant admitted that he visited his brother's place of business and knew that his brother was in the numbers business but denied any knowledge that any other persons who were taken into custody with him were in the numbers business. Rebuttal evidence was properly admitted as to the defendant's alleged association with numbers, writers and other persons under investigation.

The question of whether the defendant had a gun on the night of this occurrence was directly in issue by his denial. His attorney elected to establish by direct examination of the defendant that he did not own a gun. The commonwealth excluded by examination of the defendant such guns as

claimed by the father. Numerous other guns, in addition to the war souveniers of the father, were found in the defendant's apartment on the night of the crime. This testimony is proper rebuttal to demonstrate the believeability of the defendant's testimony concerning his ownership of a gun.

THIS COURT CONCLUDES THERE TO BE NO ERROR.

ORDER

AND NOW, on this day of December, 1979, IT IS HEREBY ORDERED AND DECREED that the defendant's Motion for New Trial at the above-captioned number is denied.

BY THE COURT:

...../s/ ALBERT E. ACKER..... J.
Albert E. Acker, *Judge*

ORDER

AND NOW, on this day of December, 1979, IT IS HEREBY ORDERED AND DECREED that the defendant's Motion for New Trial at the above-captioned number is denied.

BY THE COURT:

...../s/ ALBERT E. ACKER..... J.
Albert E. Acker, *Judge*

APPENDIX B
SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN LAGUARDIA,
Appellant

No. 187
Pittsburgh 1980

ORDER

AND NOW, this 30th day of July, 1982, it is ordered as follows:

_____ Order Affirmed.

_____ Order Reversed.

_____ Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order Modified as set forth in opinion filed herewith.

_____ Ordered as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa. R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

__X__ Judgment of Sentence Affirmed.

_____ Appeal Quashed.

BY THE COURT

...../s/ IRMA T. GARDNER.....
Deputy Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing Order was entered on the docket on the date set forth above.

Order entered: _____

IN THE
SUPERIOR COURT
OF PENNSYLVANIA

COMMONWEALTH
OF PENNSYLVANIA

v.

No. 187
Pittsburgh 1980

JOHN LAGUARDIA,
Appellant

Appeal from Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Mercer County at No. 175 Criminal 1978.

BEFORE: BECK, MONTEMURO and POPOVICH, JJ.

FILED: July 30, 1982

PER CURIAM: Judgment of Sentence affirmed.

IN THE
SUPERIOR COURT
OF PENNSYLVANIA

COMMONWEALTH
OF PENNSYLVANIA

v.

JOHN LAGUARDIA,
Appellant

No. 187
Pittsburgh 1980

Appeal from Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Mercer County at No. 175 Criminal 1978.

BEFORE: BECK, MONTEMURO and POPOVICH, JJ.

MEMORANDUM OPINION:

This is an appeal from the judgments of sentence imposed after a jury trial in which appellant, John LaGuardia, was found guilty of aggravated assault,[1] recklessly endangering another,[2] possession with intent to deliver a controlled substance,[3] and criminal conspiracy.[4] Post-verdict motions were denied, and this appeal followed. We affirm.

Appellant raises four isues on appeal. They are: (1) whether the trial court erred when it permitted the prosecution to argue that critical evidence of guilt could be inferred from a question posed by defense counsel; (2) whether the trial court erred when it denied a request for a continuance in order that appellant might subpoena a witness to testify on the chain of custody of evidence seized from the automobile which was

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[1] 18 Pa. C.S.A. 2702(a)(2) (Pamphlet 1981-2).
[2] 18 Pa. C.S.A. 2705.
[3] 35 P.S. 780-113(a)(30).
[4] 18 Pa. C.S.A. 903.

occupied by appellant; (3) whether the trial court erred when it permitted evidence, which was found in appellant's home, to be admitted in order to impeach appellant on a collateral matter; and (4) whether the trial court erred when it stated in open court that appellant's father was in court and was available to testify on the ownership of evidence found in his home. We have reviewed the record and conclude that the trial court adquately addressed the issues appellant raised in a comprehensive opinion. For this reason, there is no need to comment further

We affirm the judgments of sentence and appellant, who has been released on bond pending appeal, is remanded now to the custody of the lower court for resumption of service of his sentence.

APPENDIX C
The Supreme Court of Pennsylvania
Western District

CARL RICE
PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
PITTSBURGH, PA.
15219

November 8, 1982

James K. O'Malley, Esquire
Colonial Building
205 Ross St.
Pittsburgh, Pa. 15219

In Re: Commonwealth v. John LaGuardia
No. 223 W. D. Allocatur Docket 1982

Dear Mr. O'Malley:

This is to advise you that your Petition for Allowance of Appeal in the above-captioned matter was denied by the Court on November 5, 1982.

Very truly yours,

CARL RICE
Prothonotary

CR: cho
cc: Samuel J. Orr IV, Esq.
Hon. Albert E. Acker

APPENDIX D
CERTIFICATE OF SERVICE

Petitioner, John LaGuardia, by his attorney, James K. O'Malley, Esquire, hereby certifies that the within Petition for Writ of Certiorari has been forwarded by mail for filing to the Clerk of the Supreme Court of the United States in Washington, D.C., and that a true and correct copy of said Petition has been forwarded by mail to Samuel J. Orr, IV., District Attorney of Mercer County, Pennsylvania, Courthouse Building, Mercer, Pennsylvania 16137.

...../s/ JAMES K. O'MALLEY.....
James K. O'Malley
Attorney for Petitioner

Supreme Court, U.S.
FILED
JAN 5 1983
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 82 - 970

JOHN LaGUARDIA,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel for Respondent:

CHARLES S. HERSH, Esquire
Assistant District Attorney
Mercer County Courthouse
Mercer, Pennsylvania 16137
(412) 662-3800 ext. 162

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 82-970

JOHN LaGUARDIA, Petitioner	:	
vs.	:	No. 82-970
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

AND NOW, January 3, 1983, comes the Commonwealth of Pennsylvania by and through the District Attorney's Office of Mercer County, Pennsylvania, to oppose John LaGuardia's petition for writ of certiorari for the following reasons:

ARGUMENT

Petitioner argues that he was denied his Sixth Amendment Right to a fair and

impartial jury by the prosecution's closing argument. Petitioner further claims that he was denied his Sixth Amendment right to produce witnesses on his behalf by the trial court's refusal to grant a delay. Finally, petitioner claims that the trial court shifted the burden of proof from the Commonwealth to the petitioner by commenting in the presence of the jury that petitioner could call his father as a witness to prove ownership of certain seized guns.

It is the Commonwealth's position that the United States Supreme Court should deny certiorari in this matter because:

1. The Pennsylvania courts properly dissolved all of the above issues against the petitioner.

The first Pennsylvania court to hear petitioner's complaints was the Honorable Albert E. Acker, Judge of the Mercer County, Pennsylvania, Court of Common Pleas. Petitioner has attached a copy of Judge Acker's opinion, which is Appendix "A".

Petitioner subsequently appealed to the Superior Court of Pennsylvania raising the identical issues and the Superior Court on July 30, 1982, affirmed the judgment of the sentence. Petitioner in his petition for writ of certiorari has attached a copy of the memorandum opinion of the Superior Court of Pennsylvania as Appendix "B".

Finally, the Supreme Court of Pennsylvania declined to review the Superior Court's decision by denying petitioner's petition for allowance of appeal on

November 5, 1982, as set forth in petitioner's brief as Appendix "C".

The petitioner, John LaGuardia, was convicted after a jury trial of the following offenses: aggravated assault on the person of Mercer County Deputy Sheriff Dana Frankenburg based on causation of bodily injury with a firearm to the officer while making an arrest,[1] recklessly endangering Mercer County Narcotics Officer Gary Lenzi with an automobile or firearm,[2] possession of cocaine with intent to deliver,[3] and criminal conspiracy to possess cocaine with intent to deliver.[4] Petitioner was

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1 18 Pa. C.S. §2702.
2 18 Pa. C.S. §2705.
3 35 Pa. C.S. §780-113 (a) (30).
4 18 Pa. C.S. §903.

acquitted of twelve other offenses.[5] All charges arose from a series of events occurring on or about March 5, 1978.

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5 The petitioner was found not guilty of criminal conspiracy as to aggravated assault upon Dana Frankenburg while not attempting to make a lawful arrest, aggravated assault upon Dana Frankenburg either by firearms or by automobile while not attempting to make a lawful arrest, criminal conspiracy as to aggravated assault upon Dana Frankenburg while attempting to make a lawful arrest, aggravated assault upon Dana Frankenburg not causing bodily injury by either firearm or automobile while attempting to make a lawful arrest, conspiracy as to murder in the first degree of Dana Frankenburg by use of a gun, criminal conspiracy as to recklessly endangering as to Gary Lenzi by firearms or automobile, criminal conspiracy of aggravated assault upon Gary Lenzi causing bodily injury while attempting to make a lawful arrest, aggravated assault upon Gary Lenzi causing bodily injury by firearms only while attempting to make a lawful arrest, criminal conspiracy as to aggravated assault upon Gary Lenzi either by firearms or automobile while not attempting to make a lawful arrest, aggravated assault upon Gary Lenzi either by firearms or automobile while not attempting to make a lawful arrest, criminal conspiracy as to aggravated assault upon Gary Lenzi while attemtping to make a lawful arrest, aggravated assault upon Gary Lenzi by either firearms or automobile while artempting to make a lawful arrest.

Prior to March 5, 1978, William Frank, an informant employed by the Mercer County Narcotics Unit, met with petitioner and subsequently spoke to him by telephone. During the personal meeting, the informant was disguised and identified himself only as "Willy." (N.T. 320, 321). The informant had never previously met nor seen petitioner. (N.T. 319). As a result of these conferences a drug transaction was set up for 8:00 p.m., March 5, 1978, in the parking lot of the Sheraton Inn, West Middlesex, PA. The petitioner and an associate were to arrive at the Sheraton Inn parking lot at the appointed date and time with approximately two pounds of cocaine which was to be sold to the informant for $35,000.00. The informant obtained such a sum to be used as flash money. (N.T. 334).

Members of the Mercer County Narcotics Unit were present at various vantage points allowing them to surveil the Sheraton Inn parking lot. The petitioner and an associate, as previously noted were to arrive at the parking lot with the cocaine. Mr. William Frank and his associate, James Sutley, narcotics unit informers were to be at the scene. Mr. Sutley was to show the petitioner the flash money, at which time petitioner would provide cocaine to be tested by Mr. Frank in a room in the Sheraton Inn. If the cocaine were of satisfactory quality and purity, the petitioner was to deliver the full two pounds in exchange for $35,000.00. This was the plan as agreed between petitioner and Mr. Frank. (N.T. 332, 333).

In reality, the Narcotics Unit officers and the informants had agreed that Mr. Sutley would enter petitioner's vehicle, show him the money, and have petitioner produce some or all of the cocaine. When Mr. Sutley saw the cocaine, he was to signal the narcotics officers by lighting a cigarette, at which time they would move in on the vehicle and arrest petitioner and his associate. (N.T. 125-129,339).

Mr. Sutley did in fact enter petitioner's vehicle. Petitioner was driving, Sutley on the front passenger seat, and petitioner's associate Patrick Harbison in the back seat. The foregoing events occurred, with the cocaine being produced by petitioner. (N.T. 496-503).

Officers Dana Frankenburg and Gary Lenzi advanced on the vehicle, displaying identification and announcing themselves as police officers. Officer Kenneth Torrence approached from the rear. (N.T. 136). As the officers neared petitioner's vehicle, both petitioner and Harbison produced handguns. (N.T. 505). The vehicle's engine was started and it began to move slowly.

At this point, Officer Lenzi jumped onto the hood of petitioner's vehicle, placing his identification badge directly in front of the windshield. The vehicle accelerated, knocking Officer Lenzi to the ground. (N.T. 137, 138). Almost simultaneously, shots were fired from within the petitioner's auto. One shot struck Officer Frankenburg, grazing his cheek. The shot was fired from the vicinity of

the front driver's seat. (N.T. 563, 566). The officers fired back at petitioner's vehicle, attempting unsuccessfully to disable it.

A high speed chase ensued in which petitioner was pursued by the police for 10.3 miles at speeds exceeding 85 miles per hour. (N.T. 151, 192). In addition to the narcotics officers, police units from three localities, the Pennsylvania State Police, the Ohio State Patrol and the Trumbull County Ohio Sheriff's Department took part in the chase which ended shortly after petitioner crossed the Ohio border. Petitioner and Patrick Harbison were arrested at that time. A quantity of cocaine along with drug related paraphernalia were recovered from the chase route and petitioner's vehicle.

Extradition proceedings were immediately commenced against petitioner. However, he was not returned to Pennsylvania until January 19, 1979, after his arrest by Boardman, Ohio police on unrelated charges. Several extradition hearings were held between March 5, 1978, and January 19, 1979, resulting in petitioner's bond being revoked and his extradition ordered.

A preliminary hearing was held in the instant case on February 2, 1979. William Frank, the narcotics unit informant instrumental in setting up the "buy bust" did not testify at said hearing. He was not identified at the hearing. Frank had previously been promised anonymity. (N.T. 337, 479).

Prior to petitioner's trial, he attempted to retain Attorney Herman Rodgers as counsel. Mr. Rodgers was removed from the case on motion of the Commonwealth because he had previously represented William Frank in an unrelated drug case. In a memorandum filed in opposition to the Commonwealth's motion, Mr. Rodgers referred to Mr. Frank as "Willie Frank."

At no time prior to trial did the Commonwealth refer to Mr. Frank as "Willy." During the trial, counsel for petitioner referred to Mr. Frank as "Willy" on two occasions during cross-examination of Officer Lenzi. (N.T. 216, 218). After said cross-examination Mr. Frank revealed that he had used the pseudonym "Willy" when dealing with petitioner.

As noted above, petitioner was convicted by a jury of four charges. Timely post-trial motions were filed and denied by the trial court. The instant appeal follows.

It is the Commonwealth's position that the trial court correctly permitted the prosecuting attorney to argue that evidence of guilt could be inferred from a question asked by defense counsel and therefore there is no Sixth Amendment violation.

As previously noted the instant case arose from what may be characterized as a "buy bust" narcotics transaction involving petitioner and the Mercer County Narcotics Unit.

William Frank, an informant employed by the police, testified that prior to March 5, 1978, he met with petitioner, with whom he was previously unacquainted for the purpose of arranging a sale of narcotics from petitioner to undercover representatives of the police. Mr. Frank testified that he disguised himself during the meeting and used the pseudonym "Willy." (N.T. 320, 321). Mr. Frank further testified that he did not testify at the preliminary hearing in the instant case, nor did he expect to testify in any proceeding. (N.T. 337, 479).

An in trial review of the preliminary hearing transcript, which has been made a part of the record in the instant case, by the lower court confirmed that Mr. Frank

did not testify at said hearing and was not identified or referred to by name or as "Willy" during its course.

Prior to trial, the Commonwealth filed a motion to require the withdrawal of Attorney Herman Rodgers as petitioner's counsel. The motion was predicated upon Attorney Rodgers' prior representation of Mr. Frank in an unrelated drug charge. Attorney Rodgers opposed the motion and filed a memorandum in support of his position referring to Mr. Fank as "Willie Frank."

Attorneys William Panella and Carmen Policy represented petitioner at trial.

During the course of Attorney Policy's cross-examination of Officer Gary Lenzi, the attorney twice referred to Mr. Frank

as "Willy" leading to the following exchange which followed the first reference:

> "THE COURT: Could we correct the name of that. I believe this man's name is Billy or William. I don't think that it's Willy unless he's willing to accept that. That may be another name for him but in this trial he's only referred to by those two names.
> "Q. As Billy. Is he called Willy Frank or Billy Frank or William Frank?
> "A. It's William or Bill Frank, Billy." (N.T. 216).

To that point, Mr. Frank, as noted by the court, had not been referred to as "Willy." His use of the pseudonym "Willy" had not been revealed by the Commonwealth.

Petitioner later testified on his own behalf. He denied ever meeting with Mr. Frank to set up a drug transaction, denied going to the Sheraton Inn on March

5, 1978, to consummate such a transaction, and denied shooting at the arresting officers.

In her closing remarks, the prosecuting attorney argued in part as follows:

> "He tells you that as a result of a telephone conversation he had with this defendant, he met the defendant at Howard Johnson's Motor Lodge on Route 19 south of Mercer. And ladies and gentlemen, I submit to you that one of the most crucial items of evidence that you would have heard in this courtroom in the two weeks came through Mr. Frank's testimony at this point. If you may recall, when he was being cross examined, I objected to his being referred to as Willie. You will recall, I'm sure, that the Court instructed counsel concerning that matter and told him he was to address him as Mr. Frank, and that his name was William Frank or Billy Frank. You will recall, I'm sure, that Chief Lenzi at all times when he referred to Mr.

> Frank referred to him as Billy Frank. But defense counsel cross-examined him and referred to him as Willie. Now, I submit to you that Mr. Frank subsequently divulged that when he met this defendant, and when he was playing the part and not giving his last name, although he had the defendant's last name, he told the defendant his name was Willie in the Howard Johnson's parking lot on the night they met and first discussed this transaction. There was no testimony of any Willie being used at any preliminary hearing. To the contrary, Chief Lenzi told you he was attempting to at that time still keep him as a confidential informant and not divulging his name."

Prosecuting counsel, in effect, asked the jury to infer that defense counsel could only have learned of the name "Willy" from petitioner, thus corroborating Mr. Frank's testimony about his meeting with petitioner.

Defense counsel objected to the inference, stating that he had encountered

the name "Willy" in the context of a prior proceeding, most probably the preliminary hearing. The court overruled the objection.

Petitioner now contends that the prosecutor's argument was not supported by the evidence and mandates award of a new trial.

As noted by the lower court, a prosecutor must limit statements to facts and evidence and legitimate inferences that can be drawn therefrom. (lower court opinion, page 14) citing Commonwealth v. Harvell, 458 Pa. 406, 327 A.2d 27 (1974); Commonwealth v. Revty, 448 Pa. 512, 295 A.2d 300 (1972); Commonwealth v. Hill, 479 Pa. 346, 388 A.2d 689 (1978); Commonwealth v. Long, __Pa. Super. __, 392 A.2d 810 (1978) and the American

Bar Association Standards relating to the Prosecution Function §5.8 (a) and §5.9.

In the case at bar, it is submitted that the prosecutor's remarks constitute a reasonable inference from the record. Even if prior counsel referred to Mr. Frank as "Willie Frank," said reference occurred before Mr. Frank's use of the pseudonym "Willy" was made known by the Commonwealth. Thus, it may still be reasonably inferred that the name "Willy" or "Willie" was supplied to counsel by petitioner, who alone, aside from agents of the Commonwealth knew Mr. Frank as "Willy" or "Willie."

Assuming arguendo that the prosecutor's remarks constituted error, it is further submitted that the error was harmless and does not warrant award of a

new trial. As noted in Commonwealth v. Story, __Pa.__, 383 A.2d 155, 162 (1978) trial error is harmless if the appellate court can so conclude beyond a reasonable doubt. It is submitted in the instant case that the properly admitted evidence of guilt is so overwhelming as to render any error harmless.

As noted previously, Mr. Frank and Mr. Sutley both testified re the first meeting with petitioner. Mr. Frank testified as to subsequent telephone conversations setting the date, time, location, and purpose of the meeting. Petitioner appeared at the appointed location. Mr. Sutley testified that petitioner produced cocaine and a firearm and was driving his vehicle. Mr. Frankenburg testified that shots were fired from

the driver's position. Mr. Lenzi testified that the driver accelerated the car throwing him from the vehicle. Cocaine was recovered. Petitioner was captured while driving the vehicle after a high speed chase. The Commonwealth, in summary, presented testimony from which it can be inferred that petitioner appeared at a pre-arranged narcotics sale with narcotics for sale, shot at at least one officer, endangered another, and attempted to escape. Against the weight of such testimony, any error was harmless.

It is the Commonwealth's further position that the trial court correctly refused petitioner's request for a continuance for the purpose of securing an additional witness, and that the trial

court did not violate petitioner's Sixth Amendment right in so doing.

With reference to the above issue, the Commonwealth adopts the rationale of the trial court which is repeated below:

> "The testimony of the Commonwealth was that there was $35,000.00 in cash in the defendant's motor vehicle driven from the scene along with a hostage in a hail of bullets. The car was chased for approximately 10 miles throughout Pennsylvania before it got onto Interstate 80 and was eventually stopped going west just beyond the Pennsylvania-Ohio border in Ohio. Deputy Sheriff Anthony Beall, of Trumbull County, Ohio, received a radio message concerning this event. He proceeded toward the Pennsylvania border on Interstate 80 when he was dispatched directing him to the area. Upon arriving at the scene he found two men in handcuffs being placed in a marked Hermitage police department vehicle and two Mercer County Narcotics agents. After the defendants were taken in a police cruiser to jail, the deputy remained in the area of

the vehicle in order to secure it until a wrecker arrived. He noted bullet holes in the right front door of the passenger side. The windows were down. In examining the holes, he found a bag of money in the car. The money was in a brown bag similar to that in which groceries are held. The deputy looked into the bag and saw that there was 'a lot of money.' He rolled the bag back up, closed the door of the car and radioed that one of the packages that was being looked for was found. The other package was to have contained cocaine. He did not count the money. Two agents of the Narcotics Unit returned to the scene. The deputy took the money and turned it over to his lieutenant. This testimony was received on May 23rd, being the 7th trial day. The name, Lieutenant Whiteside, was disclosed early in cross-examination of the deputy during the morning of May 23rd. Following the completion of another witness and just prior to lunch of that date, Attorney Policy for the defense suggested that he had a possible or potential witness and he was going to have to run out and try to serve a subpoena. He did not disclose the name of the witness. He inquired

as to how much more time the Commonwealth would take to complete its case and requested permission to give an opening and start his testimony the following day. The Court indicated that it had never made it a practice to stop a case to let either the district attorney or the defense run after witnesses in that it felt it was a bad practice. There was no motion on that day of the 23rd of May, 1979.

"On the morning of May 23, 1979, shortly prior to the completion of testimony, counsel for the defendant approached the bench stating that they had learned for the first time, the day previous, that Lieutenant Whiteside was the person to whom the money had been delivered. Attorney Policy stated that he had found Lieutenant Whiteside the night before and talked to him at some length. He said another attorney, without naming him in Trumbull County, had talked to him that morning at length; that Whiteside indicated that he would not appear unless forced to do so by subpoena. An address was given and a phone number in Warren, Ohio, and his place of employment also being in that city in the State of Ohio. He was no

longer a full time employee of the Sheriff's department. Questioning whether this Court had the power to order him to appear, Attorney Policy requested the Court through the prosecutor's office to request the appearance of the witness either that afternoon or the following morning. Despite objection by the Commonwealth that it did not have the power to subpoena across the state line, the Court entered an Order directing the District Attorney to contact Lieutenant Leskovac who was the witness's superior officer while the witness was on the force to inform Whiteside his presence was required in Court the following morning at 9:30. The Court brought to counsel's attention that if the witness did not appear, counsel should not come back to the Court because of defense counsel's failure to exercise the proper procedure through the Interstate Rendition of Witnesses Act bring the witness into court. Neither side knew the name Lieutenant Whiteside until the previous day. At 1:55 p.m. of that same day, May 23, 1979, counsel for the defendant presented a petition to secure attendance of the witness. This is authorized under the Act of July 9, 1976, P.L.

586, No. 142, Section 2 [42 Pa. C. S.A. 5964]. The Court immediately entered the proposed order directing that Joseph Whiteside be taken into bustody and delivered to an officer of this State to assure his attendance on May 24, 1979 at 9:30 o'clock, a.m. The Clerk of this Court sent the certified copy of the petition and order on May 23, 1979 but it was not received by the Courts of Trumbull County until May 25, 1979. The verdict, however, was received at 1:15 a.m. of that day. At about 4:21 p.m., on Wednesday, May 23, 1979, the Court instructed the jury there was potentially one more witness for the defense who may or may not appear the following morning at 9:30 a.m. The jury was further instructed that despite that the Court was going to proceed with rebuttal testimony and complete all of that testimony that day except one witness. The witness to be called the next morning for the defense would be permitted to testify as well as any surrebuttal to be produced by the defense. The Commonwealth then called the witness, David Allen, the Chief of Detectives of the Austintown Police Department. The following morning, Whiteside failed to appear. The defense requested a continuance.

All the testimony with the exception of Whiteside had been received. The case was then in its eighth (8th) day. The Court refused the continuance. The closing arguments and the charge were given and the jury retired to deliberate.

"The grant or refusal of a continuance lies within the sound discretion of the trial court and its action will be reversed only when there is found to be an abuse of discretion. Commonwealth vs. Howard, 466 Pa. 445, 353 A.2d 438 (1976); Commonwealth vs. Simmons, 361 Pa. 391, 65 A.2d 353, cert. den. 70 Supreme Court 96, 338 U.S. 862, rehearing denied 70 Supreme Court 181, 338 U.S. 888 (1949). The rule has also been stated that an appellate court will not reverse a trial court's denial of a continuance without a palpable and prejudicial abuse of discretion. Commonwealth vs. Kishbach, 247 Pa. Super. Ct. 557, 373 A.2d 118 (1976). It has also been phrased that the denial of a request for continuance will not be granted unless it's so arbitrary that it violates due process. Commonwealth vs. Merritt, 227 Pa. Super. Ct. 257, 323 A.2d 875 (1974).

"In Commonwealth vs. Scott, 469 Pa. 258, 365 A.2d 140 (1976), it was held the grant of a continuance to secure a material witness is within

the lower court's discretion. It cited as authority Commonwealth vs. Smith, 442 Pa. 265, 275 A.2d 98 (1971) for the criteria to determine whether there has been a proper exercise of that discretion. Five factors are cited. One, the necessity of the witness to strengthen the defendant's case. Two, the essentiality of the witness to the defendant's defense. Three, the diligence exercised to procure his presence at trial. Four, the facts to which he could testify. Five, the likelihood that he could be produced at the next term of court. In Smith, supra, there was a reversal of the lower court in the refusal to grant the continuance. The Supreme Court noted particularly, however, that the defendant's sole defense was alibi and the desired witnesses were alibi witnesses. Therefore, it was obvious that the denial prevented the defendant from presenting his only defense. On the other hand, if the testimony desired is merely cumulative or available from another source, a continuance may properly be denied. Commonwealth vs. Howard, supra, wherein Franklin vs. South Carolina, 218 U.S. 161, 168, 30 Supreme Court 640, 643 (1910) is cited as authority, at page 447,

' "It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law." '

"Although we have found no case which articulates a more restrictive rule for continuance during the course of a trial than pre-trial it is apparent that there are substantial additional elements for consideration. This is particularly true where a trial that has gone on for a number of days and there is a concern of the jurors becoming contaminated or forgetting previous testimony. As to the latter, if the continuance had been granted, it might well have required more than one day to have attempted to get Lieutenant Whiteside into Court. The case was approaching the weekend. It could have required the jury to wait from Thursday morning to Monday morning after 8 days of testimony and no other witness to be produced. Commonwealth vs. Drew, 190 Pa. Super. Ct. 478, 154 A.2d 285 (1959) is a case where a request was made for continuance during trial. The witness, although 10 feet away from

a drug transaction of a busy downtown street in Philadelphia, might have seen the transaction and therefore be a eyewitness, there was no testimony that he did see the transaction. In fact the Commonwealth's witness stated that he did not believe that the desired witness saw the transaction. Not being an eyewitness to the transaction, the Court held there was no abuse of discretion in refusing the continuance during the course of the trial to produce the witness. That trial had proceeded 4 days as opposed to the 8 days already consumed in the instant case. Even more important, the defendant does not contend that there was not a bag of money in the car. His basic story was that he had lent his car to his friend, Pat Harbison and on the day of this incident he was to receive his car back. Harbison called him on the afternoon of this event, being a Sunday, and asked if he could use his car a little longer, perhaps another day or two. Defendant said he wanted the car back that night. Harbison said then he would come over to the defendant's girlfriend's house to drop the car off. As the defendant was being taken back to his house, Harbison asked the defendant, '...if I could drive him up to Pennsylvania a second....'The

defendant admitted that in the back seat of the car there was a gym bag and a grocery bag and a square brown box. Upon arriving at the Sheraton in Pennsylvania, he said a person came out of the Sheraton and got into the car and asked Harbison, who was in the back seat, if he had the money.[7]

"The defendant testified that Harbison passed up the brown bag to the front seat and Sutley, the friend of the informant, opened it, took out the green money envelope, opened it and started leafing through the money. It came from a plastic bag and there was a 'lot of money there.'

"To now contend through Lieutenant Whiteside that the money was not turned over to him despite the testimony of the deputy sheriff who found it in the car and testified he gave it to Lieutenant Whiteside may establish the possibility of another crime but is not in contradiction of the testimony of the defendant that a lot of money was present in the car.

"7 This is absolutely contrary to the Commonwealth's position that William Frank produced the money which was passed in the presence of the undercover agents to William Sutley who took it into the car.

> It introduces a collateral issue which does not assist in determining the guilt of the defendant of the principal offenses of which he was connected.
>
> "HENCE, THIS COURT FINDS NO ERROR."

It is the Commonwealth's further position that the trial court's comments regarding availability of a witness was proper.

By way of summary, it was the Commonwealth's theory in this case that the petitioner was an experienced cocaine dealer who on the night in question drove to the Sheraton in Mercer County, Pennsylvania to sell cocaine. It is the Commonwealth's further contention that the petitioner pulled the gun at the Sheraton, shot at the police and took off in order to elude capture. Then on the other hand he maintained that he innocently was at the

Sheraton at the request of a friend and that he had nothing to do with the firearms nor drugs.

With that background in mind, it is noted that the petitioner had testified on cross-examination as follows at page 102 of Partial Transcript of Proceedings, (hereinafter referred to as P.T.T.):

> "A. ...I did not have a gun.
> * * *
> "Q. Did you not own a gun that night?
> "A. No, I didn't.
> "Q. Did you not possess a gun that night?
> "A. No, I didn't.
> "Q. Do you own or possess... did you own or possess a gun at that time?
> "A. No, I didn't.
> "Q. None at all?
> "A. None at all.
> "Q. You did not own or possess a gun on the night of March 5, 1978?
> "A. That is correct."

In rebuttal the Commonwealth called Detective Sergeant David Allen of the Austintown Police Department. Sgt. Allen testified that the home of the petitioner was searched the day after the arrest of the petitioner in this case. This arrest refers to the night of the incident then the search would have been the next day. (P.T.T. 162 et seq.) Sgt. Allen testified that he found 11 rifles and two (2) pistols in the apartment. (P.T.T. 164). Testimony further indicated that the apartment was shared by the appellant and his father. The purpose of this testimony was to impeach petitioner's story that he did not own or possess any guns at the time. The court in fact gave the following cautionary instruction:

> "THE COURT: I want to stop a minute and explain to the jury. The evidence you have just received

concerning the possession of guns is not for the purpose to show that there was anything illegal by the defendant in possessing those guns, rather, it's for the purpose as the Commonwealth proffered, or offered, to demonstrate to the jury that guns would have been available; handguns would have been available to the defendant had he desired to have a handgun when he came over into Pennsylvania. It's meant to show the availability of a gun to him, not that it's illegal for him to have that gun in the home in Ohio. I hasten to add that the contention is, that the property was being occupied by both the father and son. It is possible that the guns, in fact all of them, belonged to the father. It's possible that some of them belonged to the father and some to the son, and none of them belonged to the son at all. Those are possibilities. However, I felt that the evidence as rebuttal had sufficient import for a jury to be permitted to consider it under proper caution. You will recall the testimony of the defendant, as I remember, that he did not have any guns on the day that this occurred. The search was made the next morning, early. I think the officer is saying 1:30, 1:35, that early in the morning.

You will recieve that testimony for that purpose only. All right." (P.T.T. pp. 165-166).

Trial counsel objected to the testimony at a sidebar conference on the basis of relevancy. (P.T.T. p. 156). Now petitioner's new counsel is arguing that it was error to permit this testimony on the basis of the law regarding impeachment of collateral matters. Assuming for the sake of argument that it was error to permit the officer's testimony on the basis of impeachment of collateral matters, it is respectfully submitted that this issue is waived since it was not preserved by the trial counsel and that trial counsel did not object to the evidence being offered for this reason, but instead he objected solely on the grounds of relevancy. When the evidence is relevant it tends to establish some fact material

to the case or tends to make the fact at issue more or less probable. Commonwealth v. Davenport, 462 Pa. 543. We submit that the relevancy of this evidence goes to the credibility of the petitioner versus the prosecution witnesses. Here we have two stories; both mutually inconsistent, therefore, any light that could be shed on who was telling the truth is extremely relevant. Even arguendo if the court feels that the evidence was logically relevant but not legally relevant in that its probative value was outweighed by unfair prejudice which would result from its submission, we submit that no trial error existed since the admission did not prejudice the right of the petitioner to a fair trial. Commonwealth v. Fell, 453 Pa. 531. Therefore, it is respectfully submitted that the

court properly permitted the Commonwealth to impeach the petitioner.

Trial counsel for the petitioner then cross-examined Sgt. Allen. On cross-examination the petitioner's attorney asked the officer if at the time the guns were found, did petitioner's father claim ownership. (P.T.T. 170). The Commonwealth objected on the grounds of hearsay and this objection was sustained. The court stated as follows:

> "THE COURT: Yes, sustained. He is present in court, as I understand it, he is available to be called."

At that point counsel for the petitioner went on to continue his cross-examination. (P.T.T. 170). At no point in time did he object to the comment by the court and, therefore, it is waived. It is black letter

law in Pennsylvania that an objection must be timely. Learned defense counsel could have at that time objected on the grounds set forth in petitioner's brief and could have moved for a mistrial. His failure to have so moved, constitutes a waiver. Moreover it is submitted that the trial court properly charged the jury in this regard regarding witnesses who are equally available to either side. In that regard the court states as follows:

> "The rule is that if a witness is not called by a side whom the jury would normally expect them to be cooperative or friendly to, to support their position, that the jury may in fact assume that their testimony would be against that side. But, in order for that rule to apply, it must be shown that the witness was not equally available to both sides. I inform you in this case there is no evidence that

any witness was not equally available to both sides, and therefore, you may not use the rule of adverse inference against either side as to any witness who was not called or potential witness." (Court's charge, pp. 32-33).

Moreover at the conclusion of the charge there was no request for additional instruction to make specific reference to the petitioner's father or any other witness. As noted in Judge Acker's opinion from which we quote:

> "The test of prejudicial effect of a comment by a court is well set forth in Commonwealth vs. Anskate, 221 Pa. Super. Ct. 122, 289 A.2d 156 (1972), at pages 124-125,
>
> 'It must be determined from all the circumstances whether a remark has a prejudicial effect; there is no fixed rule applicable to every case. An accepted guide in determining prejudicial effect is that, if the remark may be said with fair assurance to have had but a slight effect upon the jury, if any at all, and one

> is not left in doubt that it had no substantial influence in the case, it will not vitiate an otherwise fair trial.' "

Therefore, the Commonwealth respectfully submits that the trial court's comment was not improper and even if it was improper it was not prejudicial.

The United States Supreme Court has stated that when a decision might have been either on a federal ground or a state ground and the state ground is sufficient to sustain a judgment, the United States Supreme Court will not review the federal ground on appeal as of right unless the state ground is too insubstantial or insufficient. Lamb Enterprises, Inc. v. Kiroff, D.C. Ohio, 1975, 399 F. Supp. 409, reversed on other grounds, 431 U.S. 968, 97 S. Ct. 2927, 53 L.Ed 2d 1064 cert. den.

The United States court has also stated that if a state court reached its decision on state grounds, it will not review those grounds. Orr v. Orr, __U.S.__, 99 S. Ct. 1102.

It is submitted that the state constitutional provisions, its procedural rules and case law are substantial and sufficient, in fact probably exceed the requirements of the United States Constitution. Therefore, the United States Supreme Court should feel no need to review as set forth in Lamb Enterprises, Inc., supra.

In additional, petitioner's original motion in arrest of judgment or new trial initially raised at the Court of Common Pleas state level raise state, not federal, grounds as set forth in his motion in

arrest of judgment or new trial, a true and correct copy of which is attached hereto and marked Commonwealth's Exhibit "A". The Pennsylvania Supreme Court has stated many times that issues not raised at the lower court will not be heard on appeal. In fact the United States Supreme Court has recognized and approved of a similar policy when it held that a failure to present federal questions in conformance with state procedure constitutes an adequate and independent ground barring review by the United States Supreme Court so long as the state has a legitimate interest in enforcing its procedural rules. Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed 2d 486 (1978). Also it has been held that petitioner could not raise

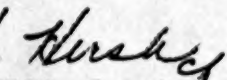
for the first time on a writ of certiorari contentions of alleged unconstitutional application where the state court had an opportunity to pass upon it. Monks v. New Jersey, 398 U.S. 71, 90 S. Ct. 1563 (1970).

For all of the above reasons, it is submitted that petitioner was afforded due process and the constitutional guarantees as set forth in the Pennsylvania Constitution. Since these state standards exceed or equal federal constitutional mandates, there is no need for this court to review the same.

Finally, in the state court, petitioner raised state grounds and not federal grounds. Therefore, it is respectfully

submitted that John LaGuardia's petition for writ of certiorari should be denied.

Respectfully submitted,



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Attorney for Respondent

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
VS	:	MERCER COUNTY, PENNSYLVANIA
JOHN J. LAGUARDIA	:	NO. 175 OF 1978 (Criminal Division)

MOTION IN ARREST OF JUDGMENT OR NEW TRIAL

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

NOW, comes the Defendant by his attorney, William M. Panella, Esq., and moves the Court for an arrest of judgment or, in the alternative, a new trial in the above entitled matter for the following reasons:

1. The verdict of the jury is contrary to the weight of the evidence.

2. The verdict of the jury finding the Defendant guilty as charged is not supported by substantial evidence.

3. By the Court's refusal of less than one (1) day's continuance, the Defendant was deprived of counsel of his choice for the full trial.

4. The Court erred in allowing the introduction of Exhibit #5 (gym bag) when there was no testimony that bag found was same bag as in Defendant's car.

5. The Court erred in allowing testimony as to Mahoning County Police officers being at Defendant's residence.

6. The Court should not have excused juror #11 and substituted juror #13, when juror #11 merely injured his eye in a minor matter.

7. In closing by Assistant District Attorney as to statements by her that the name "Willie" was not used at preliminary hearing, objections should not have been overruled as there was nothing in the evidence pertaining to this.

Commonwealth's Exhibit "A"

47A

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DISTRICT ATTORNEY

M. PANELLA
LAW
PA

8. The Court erred in overruling Defendant's objections to their charge, as follows:

a. The court should not have charged the jury that they could find the defendant guilty of conspiracy to possession of cocaine when the defendant was not indicted for such a charge.

b. The court would not clairify to the jury the charge on accomplice and it left the jury with the impression that the only defense that the defendant had was to withdraw and the court by saying " If he did not know, it would be difficult for him to withdraw.

9. The court by not waiting and continuing the trial until a witness, one Lt. Whiteside appeared by suphoena, timely filed deprived defendant of a fair trial and the opportunity and requirement that he be allowed to call any and all witnesses.

10. Over objection the court allowed Detective Allen to testify concerning certain guns found in defendant's home which were never found to be defendant's, and then when objection was made,the court in presence of the jury told defendant's counsel that they had the opportunity to call defendant's father to the stand concerning the guns, thus putting defendant in the position of calling a witness it may not desire to, and if not calling leaving the impression in the jury's mind that they had something to hide.

11. The court by these statement at sidebar that "maybe the defendant needs to be prejudiced"deprived the defendant of a trial by a fair and impartial judge.

12. The court should not have allowed Commonwealth's Supplemental Point for charge concerning defendant's right to extradation under Ohio law.

13. Rebuttal testimony concerning the search of Defendant's house should not have been allowed as there was no file kept of the search or any evidence seized.

14. The comments of the Court in their Charge would have a tendency to leave the jury with the impression that the Court favored the Commonwealth's case as opposed to the Defendant's.

Respectfully submitted,

Attorney for Defendant

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	
VS	:	MERCER COUNTY, PENNSYLVANIA
	:	
JOHN J. LAGUARDIA	:	NO. 175 OF 1978 (Criminal Division)

ORDER OF COURT

AND NOW, this _____ day of June, 1979, upon presentment of the foregoing Motion, that the same is directed to be filed and a copy thereof served upon the District Attorney of Mercer County and the stenographer is directed to transcribe all of the notes of testimony and to give notice to the counsel for the Defendant and to the District Attorney of Mercer County upon the lodging of said notes of testimony with the Prothonotary.

BY THE COURT

_____